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COMPILATION OF THE CONTRIBUTIONS SUBMITTED FOR THE CONFERENCE

Table of contents

Benin

Quelle organisation et mise en œuvre du droit de la concurrence appropriée dans des pays a différent stade de développement du marché ?

L'application du droit de la concurrence ou le fait de faire respecter les dispositions du droit de la concurrence, relève de la compétence de la structure chargée de la concurrence ou de l'Autorité de la concurrence. Après avoir rappelé la définition du droit de la concurrence et ses objectifs, la contribution abordera les points suivants :

- responsabilité de l'autorité de la concurrence ;
- fonctionnement du marché ;
- situation du Bénin
- recommandations.

I- DROIT DE LA CONCURRENCE

Le droit de la concurrence regroupe l'ensemble des dispositions législatives et réglementaires visant à garantir le respect du principe de la liberté du commerce et de l'industrie.

Compte tenu de ses objectifs à savoir la protection des consommateurs et la promotion de la prospérité de l'économie, les autorités de la concurrence doivent tenir compte du développement du marché afin de définir la stratégie à mettre en place pour les atteindre.

A cet effet, dans les pays à différents stades de développement du marché, les autorités chargées de la concurrence suivent l'évolution du marché et déterminent les actions pouvant permettre de prendre les dispositions qui s'imposent.

A défaut de pouvoir instaurer une concurrence pure et parfaite, le rôle du droit de la concurrence est souvent d'obliger les entreprises à participer au jeu de la concurrence ou à la subir.

La protection des concurrents n'est pas le souci premier du droit de la concurrence ; ce qui le préoccupe en principe, est le fonctionnement macro-économique du marché et notamment la recherche de l'efficience économique.

II- RESPONABILITE DE L'AUTORITE DE LA CONCURRENCE

La structure chargée de la concurrence est souvent sous tutelle d'un Ministère à qui elle doit rendre compte ou prendre son avis sur certaines questions touchant la concurrence. Au Bénin, la Direction Technique de la Concurrence est sous la tutelle du Ministère en charge du Commerce.

Au niveau des pays de l'UEMOA, les cas de pratiques anticoncurrentielles sont portées à la connaissance de l'Union qui est chargée de les examiner avec les structures compétentes en la matière avant la prise de décision.
Quant aux autres cas de concurrence déloyale, ils relèvent de la compétence des structures nationales.

III- FONCTIONNEMENT DU MARCHE

Le marché est un lieu de rencontre entre l'offre et la demande de produits ou de services substituables à une demande correspondante. Sur ce marché, les différents acteurs retrouvés sont les entreprises, les consommateurs et l'Administration publique dont le rôle est de faire respecter les principes du libre jeu de la concurrence au sein de ce marché.

L'absence de concurrents offre une chance à la seule société qui pourrait pratiquer le prix de sa convenance au détriment de l'intérêt des consommateurs. A ce niveau la troisième catégorie d'acteurs économiques, qu'est l'Administration publique, précisément l'Autorité en Charge de la concurrence a l'obligation d'intervenir pour

rappeler à l'entreprise ses limites et en cas de non respect des dispositions en vigueur dans le domaine de la concurrence, faire appliquer les sanctions prévues par les textes en vigueur.

IV- SITUATION DU BENIN

La position géographique du Bénin, qui en fait un pays par excellence à vocation de transit, constitue un atout majeur au développement des activités commerciales. Mais cet avantage n'est pas sans inconvénients tels que :

- les fraudes et contrebandes ;
- les imitations de dessins ou marques ;
- la publicité mensongère ;
- la vente à la loterie ou avec concours ;
- la vente avec primes.

En raison du vide juridique caractérisant au plan national ces comportements et pratiques, la Direction chargée de la Concurrence recourt d'une part aux Actes Uniformes adoptés par l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) et d'autre part à l'Accord portant révision de l'Accord de Bangui du 02 mars 1977 instituant une Organisation Africaine de la Propriété Intellectuelle (OAPI) en ce qui concerne particulièrement les imitations de dessins ou marques.

En effet, dans la quasi-totalité des pays africains francophones, les codes français dans les divers domaines juridiques faisaient partie du droit positif national. Aussi, le recours au Code de Commerce français ne posait-il pas de problème dans le cas des pratiques de concurrence déloyale.

Mais avec l'avènement des Actes Uniformes de l'OHADA, le Code de Commerce français n'est plus en vigueur dans les pays membres de cette organisation.

Les autorités de la concurrence rencontrent d'énormes difficultés dans l'exercice de leur fonction, surtout en ce qui concerne :

- le contrôle de prix des produits qui ne se fait plus depuis la libéralisation du commerce, à l'exception de certains dits stratégiques tels que les produits pétroliers, le ciment, le pain, les fournitures scolaires pour ne citer que ceux-là ;

- le non respect par certains acheteurs du « prix plancher » fixé par une commission pour les produits agricoles (noix de cajou, amandes de karité) ;

- le comportement de certaines entreprises qui, sous le couvert de la libéralisation du commerce, pratiquent le système de prix conseils en imposant à leurs distributeurs les prix de cession des produits ;

- la réticence de certains opérateurs économiques à collaborer avec la structure chargée de la concurrence ou à fournir des informations fiables ;

- le développement du secteur informel qui sert de paravent à des commerçants évoluant dans celui informel ;

- la création des sociétés fictives qui disparaissent lorsque des enquêtes de concurrence déloyale ou de pratiques anticoncurrentielles sont enclenchées.

VI- RECOMMANDATIONS

Dans le cadre de la mise en application des dispositions relatives à la Concurrence, des recommandations ont été formulées. Il s'agit notamment :

- du renforcement des capacités des agents chargés du respect de l'application des dispositions des textes législatifs et réglementaires en matière de concurrence ;

- de l'adoption en procédure d'urgence du projet de loi portant organisation de la concurrence en République du Bénin par l'Assemblée Nationale et sa promulgation par le Président de la République ;

- de la mise à disposition des structures en charge de la concurrence, des moyens adéquats en vue de remplir efficacement la mission à elles assignée.

CONCLUSION

Le respect du principe de la liberté du Commerce et de l'Industrie au Bénin est conditionné par la mise en œuvre des recommandations minimales énumérées plus haut.

Burkina-Faso

Au Burkina Faso, la mise en œuvre de la politique de la concurrence s'est traduite par la volonté d'assainir l'environnement économique national et de renforcer le processus de l'intégration économique sous-régional (UEMOA, CEDEAO), le tout résultant des reformes économiques telles que la libéralisation du commerce et des prix, la déréglementation et la privatisation des entreprises publiques.

Les objectifs poursuivis par cette politique sont l'accroissement de l'efficience économique, la recherche du bien-être des consommateurs, et la stimulation de la croissance économique accélérée pour un développement économique durable du pays.

Après plus d'une quinzaine d'années, l'application du droit et de la politique de la concurrence pose un certain nombre de problèmes qui soulèvent la question de son effectivité.

La présente contribution examinera, d'une part, le dispositif réglementaire et institutionnel existant au Burkina Faso, relativement au droit et à la politique de la concurrence, et d'autre part, la mise en œuvre ou l'application du droit et de la politique de la concurrence.

I. Le dispositif réglementaire et institutionnel aux plans national et communautaire

A- Le dispositif réglementaire au plan national et communautaire

Au Burkina Faso, l'architecture juridique relatif au droit de la concurrence, peut être divisée en deux catégories de textes :

- les textes d'origine nationale,
- et les textes d'origine communautaire.

2) le dispositif réglementaire au plan national

Il est principalement constitué de la loi n°15/94/ADP du 05 mai 1994, portant organisation de la concurrence au Burkina Faso (modifiée par la loi n° 33-2001/AN du 04 décembre 2001), et de ses textes d'application.

Cette loi a pour finalités ***i)*** de faire jouer la concurrence loyale et saine entre opérateurs économiques au niveau du rapport prix/qualité des produits et services, ***ii)*** d'assurer la protection du consommateur, ***iii)*** de consolider le marché commun de l'UEMOA.

Aussi, proscrit-elle les trois types de pratiques suivantes :

- les pratiques anticoncurrentielles,
- les pratiques restrictives de la concurrence et celles entravant le libre jeu de la concurrence,
- les autres pratiques illicites de la concurrence (tromperies et falsifications, sécurité du consommateur, clauses abusives, lutte contre la fraude…).

En vue d'assurer l'application de ses dispositions, la loi ci-dessus citée, a prévu des sanctions de type administratif, correctionnel et civil.

3) Le dispositif réglementaire au plan communautaire

Il comprend le traité de l'UEMOA et ses textes y relatifs suivants :

- le règlement n°02/2000/CM/UEMOA du 23 mai 2002, relatif aux pratiques anticoncurrentielles à l'intérieur de l'UEMOA,

C'est un « règlement substantiel » qui précise les interdictions des pratiques anticoncurrentielles visées à l'article 88 alinéas a et b du traité de l'UEMOA

- le règlement n°03/2002/CM/UEMOA du 23 mai 2003, relatif aux procédures applicables aux ententes et abus de position dominante à l'intérieur de l'UEMOA.

Il est aussi appelé « règlement procédural » dans la mesure où il définit non seulement les procédures en cas de contentieux relatifs aux pratiques anticoncurrentielles, mais il contient aussi **a)** des notes interprétatives de certaines notions usitées dans ledit règlement et, **b)** les spécifications des formulaires obligatoires pour les demandes et notifications, d'une part, pour les attestations négatives, et de l'autre, pour les exemptions en matière d'entente.

- le règlement n°04/2002/CM/UEMOA du 23 mai 2002, relatif aux aides d'Etat à l'intérieur de l'UEMOA et aux modalités d'application de l'article 88 (c) du traité.

- la directive n° 01/2002/CM/UEMOA du 22 mai 2002, relative à la transparence des relations financières, d'une part, entre les Etats membres et les entreprises publiques, et d'autre part, entre les Etats membres et les organisations internationales ou étrangères.

- la directive n° 02/2002/CM/UEMOA du 23 mai 2002, relative à la coopération entre la Commission et les structures nationales de concurrence des Etats membres pour l'application des articles 88, 89 et 90 du traité de l'UEMOA.

Ces trois règlements, de même que les directives ci-dessus citées qui en procèdent, constituent le droit dérivé de la législation communautaire de la concurrence ; le doit primaire comprenant les principes et les règles posés par le Traité constitutif de l'UEMOA, notamment ses articles 76, 83 et 88 à 90.

B- Le dispositif institutionnel au plan national et communautaire

Au Burkina Faso, la mise en œuvre du droit et de la politique de la concurrence est confiée à quatre structures nationales, et trois organes communautaires de l'UEMOA.

1) le dispositif institutionnel national

Les principales structures nationales chargées du droit et de la politique de la concurrence sont les suivantes :

- **La Commission Nationale de la Concurrence et de la Consommation (CNCC).** Créée par la loi ci-avant citée, elle est l'organe de régulation de la concurrence et de la consommation au Burkina Faso. Elle est investie de trois (03) missions.

- **Une mission d'observation et de veille du libre jeu de la concurrence.** A cet effet, la Commission a l'obligation d'élaborer chaque année, un rapport sur l'état de la concurrence au Burkina Faso. Ce rapport est l'occasion pour la Commission de donner une appréciation d'ensemble de l'économie burkinabè sous l'angle du droit et de la politique de la concurrence.

Ce rapport peut exercer une pression morale sur les décideurs politiques, puisqu'il fait l'objet d'une large publication et diffusion.

- **Une mission de conseil en matière de concurrence et de consommation**. En effet, avant toute adoption de textes réglementaires ou législatifs touchant la concurrence ou la consommation, l'avis de la Commission doit être requis par l'Administration.

Par ailleurs, avant la transmission de dossiers au parquet pour des poursuites judiciaires éventuelles, l'Administration peut demander l'avis de la Commission sur des faits susceptibles de constituer des pratiques anticoncurrentielles ou restrictives de la concurrence.

Enfin, la Commission peut être également saisie par les commissions parlementaires, les tribunaux, les chambres consulaires, les opérateurs économiques ou leurs groupements professionnels, les régulateurs sectoriels, sur toute question générale de concurrence ou de consommation.

Par ses avis, la Commission contribue à réguler le paysage économique, et à proposer des solutions en amont pour écarter les risques de contentieux en aval.

- **Une mission de régulation**. Pour ce faire, la CNCC est chargée de mener une activité permanente de surveillance des marchés, afin de déceler les dysfonctionnements liés aux pratiques anticoncurrentielles, aux pratiques restrictives de la concurrence, et aux autres pratiques illicites de la concurrence.

Pour remplir efficacement cette mission, et sous le contrôle des instances communautaires de l'UEMOA, la CNCC dispose du pouvoir de donner des injonctions et de prononcer des sanctions pécuniaires à l'encontre des opérateurs économiques qui enfreignent les règles de la concurrence. Ces injonctions et sanctions peuvent faire l'objet d'un recours devant la Cour d'Appel de Ouagadougou, par toute partie mise en cause et par l'Administration, conformément à la loi, ou le cas échéant, devant la Cour de Justice de l'UEMOA.

Ainsi, la CNCC participe à la sauvegarde de l'ordre économique national, en toute indépendance.

- **L'Inspection Générale des Affaires Economiques (IGAE) et la Direction Générale du Commerce** (**DGC)** complètent aux côtés de la CNCC le dispositif institutionnel national en charge du droit et de la politique de la concurrence rattaché au Ministère du Commerce.

La première a vocation à intervenir sur les marchés, tandis que la seconde est principalement chargée de l'élaboration du droit de la concurrence.

- Les organes sectoriels tels que **l'Autorité de Régulation des Communications Electroniques (ARCE)** compose également le dispositif des institutions nationales burkinabè intervenant sur les questions de concurrence.

2) Le dispositif institutionnel communautaire

Il comprend trois (03) organes, que sont :

- **Le Comité Consultatif de la Concurrence.** Il est constitué de seize (16) membres, dont deux (02) ressortissants par Etat membre de l'UEMOA.

Avant de statuer sur le fond d'une affaire, la Commission de l'UEMOA consulte d'abord les Etats membres par le biais du Comité Consultatif de la Concurrence crée par l'article 28 du règlement procédural ci-dessus cité. A cet effet, les membres de ce Comité reçoivent toutes les pièces du dossier.

L'avis du Comité porte sur l'affaire en général, et particulièrement sur le niveau de la sanction qu'il prévoit d'infliger.

- **La Commission de l'UEMOA**. Elle statue sur les infractions aux pratiques anticoncurrentielles soumises à son appréciation, et fonde sa décision sur l'avis du Comité Consultatif de la concurrence.

- **La Cour de Justice de l'UEMAO**. Les décisions formelles de la Commission peuvent être déférées devant cette Cour, qui est en matière de concurrence, compétente pour le plein contentieux et pour le contentieux de la légalité.

II. L'application du droit de la politique de la concurrence

L'important dispositif juridique ci-dessus décrit ainsi que celui des institutions chargées de sa mise en œuvre, laisse penser que le droit de la concurrence est effectivement appliqué au Burkina Faso.

La réalité relève pourtant que le droit de la concurrence est appliqué difficilement par les institutions chargées de sa mise en œuvre.

A- L'examen judiciaire des affaires de concurrence au plan national

Sur ce plan, la Commission Nationale de la Concurrence et de la Consommation a eu à examiner un certain nombre d'affaires dont elle a été saisie. Il s'agit de :

- l’affaire BRAKINA SA C/ SODIBO SA

- l’affaire Distributeurs Grossistes C/ CAMEG et Ministère de la Santé,

- l’affaire Achat du motocycles C/ Ministère de la Santé,

- l’affaire STAF C/ SONAPOST.

Ainsi, pour certaines affaires telles que l’“Achat de motocycles C/ Ministère de la Santé”, “STAF C/ SONAPOST” ou “Distributeur Grossistes C/ CAMEG et Ministère de la Santé”, la CNCC a instruit les dossiers, a délibéré et a pris des décisions y relatives indiquant qu’elle n’était pas compétente. Elle les a alors transmis à la Commission de l’UEMOA pour décision à prendre.

La CNCC a été également saisie par le Ministère du Commerce, pour avis relatif à des projets d’arrêtés.

B- Les contraintes liées à l’application du droit et de la politique de la concurrence

Il est à relever malheureusement qu’un certain nombre de contraintes rendent difficiles l’application du droit et de la politique de la concurrence au Burkina Faso. Et pour cause :

La revue du cadre juridique des règles de concurrence applicables au Burkina Faso laisse apparaître de celles-ci, un caractère fragmentaire, marqué souvent par leur inachèvement (que se soit au niveau national ou communautaire), et subséquemment leur difficile mise en œuvre.

En effet, les dispositions applicables de ces règles ne connaissent pas une grande effectivité d’application, si on tient compte du fait que leurs violations massives, et parfois continues, ne suscitent guère des mesures répressives de la part des institutions chargées d’y veiller.

Enfin, ces règles sont méconnues par bon nombre d'opérateurs économiques ou leurs associations professionnelles, voire certains services de l'Administration chargés de veiller à leur application.

Conclusion

L'application du droit et de politique de la concurrence repose sur la qualité des textes légaux en la matière, et sur l'efficacité des organes de mise en œuvre. Cela est d'autant plus évident à cause des contraintes de toute sorte y afférentes.

C'est pourquoi, il importe que des solutions idoines soient trouvées à cette situation, telles que la relecture des textes inadaptés et le renforcement des capacités des structures nationales chargées du droit et de la politique de la concurrence.

République du Congo

Préambule

- La République du Congo est rentrée dans la phase de réformes économiques et profondes depuis les années 90, grâce à la Conférence nationale, qui a facilité le passage du système d'économie dirigée au système d'économie libérale.

- Depuis la stabilisation de sa situation politique en 2000, et l'engagement des autorités nationales à travers le projet présidentiel « Novelle Espérance », le Congo bénéficie de l'appui de la Communauté internationale à travers les organismes des Nations Unies.

- Les autorités congolaises souhaitent un renforcement de l'assistance technique et financière liée au commerce afin de soutenir l'objectif de diversification de l'économie du pays, fortement dépendante des ressources pétrolières, et établir une base plus soutenable pour son développement dans le moyen terme.

- Aujourd'hui la participation de la République du Congo à la 6ème conférence des Nations Unies chargées de revoir les principes et les règles équitables, convenus au niveau multilatéral, pour le contrôle des pratiques commerciales restrictives, est une marque de la CNUCED qui s'efforce d'assurer en faveur des pays en développement, le traitement intégré du Commerce et du Développement et des questions associées dans les domaines du financement, de la technologie, de l'investissement et du Développement durable.

- En participation à ce forum international, nous avons conscience que la CNUCED dispose des moyens stratégiques qui puissent aider les pays en développement à relever les défis et à tirer parti au maximum d'avantages découlant d'une économie mondialisée.

- Du bilan du premier cinquantenaire de l'indépendance de notre pays, il a été relevé la nécessité de mettre le Congo sur le sentier de la modernité et de l'industrialisation à travers la mise en œuvre effective du programme de société « Chemin d'Avenir ».

- La modernité et l'industrialisation auxquelles les autorités congolaises font allusion, ne sauraient devenir une réalité sans la prise en compte des orientations de la CNUCED en matière de concurrence.

1. DE L'APPLICATION DU DROIT ET DE LA POLITIQUE DE LA CONCURRENCE AU CONGO.

- Dans la perspective de protéger le consommateur et de garantir le processus de libre jeu de la concurrence, d'éliminer les pratiques de monopoles et autres restrictions qui entravent le fonctionnement efficace des marchés et des services, en vue de défendre les intérêts supérieurs des consommateurs, la République du Congo s'est vue dans l'intérêt d'adopter la loi 06-94 du 1er juin 1994 portant réglementation des prix, des normes commerciales, de constatation et de répression des fraudes.

La mise en application de la loi 06-94 du 1er juin 1994.

a) La loi 06-94 du 1er juin 1994 a été promulguée avant l'accession de la République du Congo à l'OMC en 1997 :

- Les dispositions législatives nationales y relatives ne prenaient pas en compte les dispositions règlementaires multilatérales de l'Organisation Mondiale du Commerce (OMC).
- Certains principes et règles équitables convenus au niveau multilatéral pouvaient donc faire défaut dans ce texte législatif.

b) La loi 06-94 du 1er juin 1994 mettait l'accent sur la répression des fraudes y compris les aspects liés au régime des prix. Les questions du droit et de la

politique de la concurrence n'avaient été qu'énoncés, sans être traités de manière approfondie et détaillée pour garantir la compétitivité des entreprises et la protection du consommateur.

c) L'absence des textes d'application y relatifs avait réduit le pouvoir de répression des fraudes surtout concernant les pratiques anticoncurrentielles.

Le recours au règlement communautaire de la CEMAC dans le domaine de la concurrence.

Les autorités nationales compétentes ont exploité le règlement n°1/99UEAC-CMC-639 du 25 juin 1999 portant règlementation des pratiques commerciales anticoncurrentielles dans les pays membres de la CEMAC.

Ce règlement communautaire contient des dispositions conformes aux principes des transparences, de non discrimination et de loyauté édictés par l'Organisation Mondiale du Commerce (OMC).

Malheureusement, celui-ci ne pourrait s'appliquer au niveau national.

2. EXPERIENCE ACQUISE

Du contrôle des pratiques commerciales restrictives.

Le bilan effectué 16 ans après la promulgation de la loi 06-94 du 1er juin 1994 a montré qu'en République du Congo, la concurrence demeure émaillée des irrégularités. La compétitivité des entreprises et la protection du consommateur ne sont pas du tout effectif. En dépit des réglementations sectorielles qui existent, cette réalité déplorable est due à l'absence d'un cadre juridique approprié à chacun des deux domaines, tels que cela se passe dans d'autres pays.

A cause du vide juridique dans les domaines de la concurrence et de la protection du consommateur, la Direction générale de la consommation, de la concurrence et de la répression des fraudes (DGCCRF) et les tribunaux sont confrontés à des difficultés

dans l'appréciation et les sanctions des actes des pratiques commerciales restrictives, répréhensibles, posés par certains commerçants véreux.

Autres faiblesses techniques.

Dans le domaine de la concurrence, le Congo ne dispose pas des techniciens spécialisés en matière de contrôle des pratiques anticoncurrentielles. C'est un handicap majeur qui expose les consommateurs aux abus des opérateurs économiques mal intentionnés.

Faiblesses structurelles.

Dans le cadre du contrôle de la qualité et des poids et mesures des produits destinés à la consommation, les autorités congolaises déplorent l'absence de:

- structures appropriées, chargées de la métrologie et des normes, de la vérification de la fiabilité des produits, qui contribuent à la promotion du commerce international ;
- autorité nationale de la concurrence à côté des autorités sectorielles existantes.

L'acquisition des laboratoires spécialisés dans les domaines de la qualité, de la métrologie et des normes, ainsi que la mise en place des institutions de la concurrence demeurent des préoccupations majeures pour le Congo.

3. CONTRIBUTION DE LA POLITIQUE DE CONCURRENCE A LA PROMOTION DU DEVELOPPEMENT.

La volonté des autorités congolaises à libéraliser l'économie nationale s'est exprimée depuis le début des années 90. La concurrence avait été placée au centre de la croissance et du développement socio économique.

Depuis plus d'une décennie la politique économique libérale du Congo se consolide au jour le jour. Tous les secteurs économiques stratégique ont été libéralisés, ou sont à

l'attente d'un preneur. Ainsi, l'aspiration à la concurrence effective est le leitmotiv de la politique économique du Congo.

Les autorités compétentes congolaises pensent clairement que la libre interaction des entreprises en concurrence effective pourrait aboutir à une répartition optimale de ressources économiques du pays, aux prix les plus bas, à la qualité la meilleure et au plus grand progrès technologique.

De ce point de vue, le Congo aspire au développement d'une politique de l'économie diversifiée, où le libre jeu de la concurrence est garanti.

4. INITIATIVES GOUVERNEMENTALES CONCERNANT LE CONTROLE DES PRATIQUES COMMERCIALES RESTRICTIVES.

Sur la base la loi 06-94 du 1er juin 1994 portant réglementation des prix, des normes commerciales, de constatation et de répression des fraudes, deux projets de lois sont en cours d'élaboration. Il s'agit de :

- l'avant projet sur la protection du consommateur;
- l'avant projet de loi sur la concurrence.

5. DISPOSITIONS DES AVANTS- PROJETS DE LOIS :

Sur la politique de concurrence

Cet avant-projet de loi dispose, dans ses 56 articles, des aspects ci-après :

- Généralités (2 articles) ;
- Pratiques anticoncurrentielles :
  - Ententes (7 articles);
  - concentrations économiques (10 articles)
  - Abus de position dominante et de dépendance économique (5 articles)
- Commission Nationale de la concurrence (2 articles)

- Infractions (1 articles) ;
- Sanctions (10 articles) ;
- Poursuite des infractions (8 articles) ;
- Dispositions diverses et finales (4 articles).

Sur la protection du consommateur.

L'avant projet de loi dispose, dans ses 78 articles, des aspects ci-après :

- Généralités : 3 articles.
- Obligation d'informer le consommateur : (14 articles) ;
- Mode d'information du consommateur (8 articles) ;
- Pratiques commerciales réglementées (21 articles) ;
- Pratiques commerciales illicites et interdites (1 article).
- Conditions de ventes des produits alimentaires non emballés (4 articles)
- Vente des produits pharmaceutiques (2 articles)
- Organe de régulation de la protection des consommateurs : Conseil National de la consommation (1 article)
- Association des consommateurs (7articles)
- Constatation des infractions (4 articles)
- Infractions et sanctions (4 articles)
- Pourvoir de prononcer les amendes (5 articles)
- Dispositions diverses (3 articles).

6. SOLLICITATIONS :

Les besoins la République du Congo au stade actuel, dont elle sollicite l'appui de la CNUCED, peuvent être résumés, en :

- un appui institutionnel dans l'élaboration des lois sur la concurrence et celle sur la protection du consommateur,

- un renforcement des capacités techniques à travers des séminaires et des formations soutenues des cadres nationaux en matière de concurrence et de protection des consommateurs;
- une formulation et une mise en œuvre des politiques de concurrence et de protection des consommateurs, en tenant compte des enjeux de l'intégration des pays en développement dans l'économie mondiale.

Court of Justice – Central America

La Sexta Conferencia de las Naciones Unidas para examinar todos los aspectos del *Conjunto de Principios Equitativos Convenidos Multilateralmente para el Control de Prácticas Restrictivas*, representa el foro de más alto nivel en el ámbito global, y constituye la mejor oportunidad para que los países miembros de la ONU debidamente representados, ofrezcan sus contribuciones que ayuden a revitalizar el proceso del libre ejercicio del comercio internacional que redunde en mejores condiciones de vida para los ciudadanos del mundo.

El objetivo de esta contribución revela la necesidad de adoptar instrumentos de cooperación e intercambio de información que promuevan la competencia en los mercados regionales, que a su vez, sean instrumentos efectivos para la dinamización del proceso de integración económica en Centroamérica.

Precisamente en el caso centroamericano es oportuno mencionar que contamos con un andamiaje jurídico que promueve la competencia y sanciona el monopolio, tanto el orden constitucional de los Estados como en marco jurídico comunitario. Así, Protocolo de Tegucigalpa en su Arto. 3 literal j) que dice textualmente: *"Conformar el Sistema de la Integración Centroamericana sustentado en un ordenamiento institucional y jurídico, y fundamentado asimismo en el respeto mutuo entre los Estados miembros"*.

El Protocolo de Guatemala al Tratado General de Integración Económica Centroamericana, en su Título I. conceptualiza el proceso de integración centroamericana y recoge el compromiso de los Estados Parte de alcanzar de manera voluntaria, gradual, complementaria y progresiva la Unión Económica, cuyos avances deberán responder a las necesidades de los países que integran la región sobre fundamentos diversos, entre los cuales, se encuentra *la armonización y convergencia de políticas*; es decir políticas comunes de carácter económicas, comercial, y de servicios entre otras. De esta forma se pretende lograr la concreción de las diferentes etapas de la integración. Para el perfeccionamiento de las políticas sectoriales de carácter regional, se establece en este Protocolo de Guatemala: Artículo 25. "En el sector comercio, los Estados Parte convienen en adoptar disposiciones comunes para

evitar las actividades monopólicas y promover la libre competencia en los países de la región".

La adopción de las *disposiciones comunes para evitar las actividades monopólicas*, de las que habla el Artículo 25, antes citado, deben entenderse como normativas jurídicas y estructuras institucionales administrativas destinadas a corregir las conductas comerciales restrictivas de las empresas de los Estados Parte, fomentar la cultura de la competencia, y mediante medidas correctivas inducir el ordenamiento de los mercados regionales. Tales Conductas se tipificarían como antijurídicas en todo el territorio aduanero común, y por lo tanto traerían aparejada una sanción correspondiente de naturaleza administrativa.

Por otro lado, el *Convenio Marco para el Establecimiento de la Unión Aduanera Centroamericana* Con fecha 12 de diciembre de 2007, contiene las disposiciones jurídicas que consolidan los objetivos y principios necesarios para alcanzar la unión aduanera. En el Artículo 21, este Convenio establece el compromiso de los Estados Parte de desarrollar una normativa regional en materia de Política de Competencia. Esto constituye un asidero jurídico que fundamenta un eventual acto normativo de carácter derivado, que daría existencia a normativas de carácter regional en materia de competencia, incluyendo la adopción de mecanismos de intercambio de información y otras disciplinas que tengan por objeto combatir las prácticas anticompetitivas con efectos transfronterizos.

Para la Corte Centroamericana de Justicia, esta Sexta Conferencia del Conjunto de la ONU, es una ocasión propicia para brindar, desde su óptica y experiencia de Órgano Judicial permanente del Sistema de Integración Centroamericana, algunas opiniones y consideraciones alrededor de dos grandes cuestiones en las cuales, países miembros de la ONU interesados en profundizar los procesos de integración, están trabajando a fin de coadyuvar al desarrollo económico y bienestar de nuestros ciudadanos, a saber:

- Modalidades para facilitar las consultas voluntarias entre Estados miembros y grupos regionales, con arreglo a la sección F del Conjunto de Principios y Normas[1].
- Importancia de establecer redes de contacto en el intercambio de información no confidencial para facilitar la cooperación entre los organismos reguladores de la competencia

Estos temas deben verse como piezas fundamentales en el largo proceso de implementación del propio "Conjunto de las Naciones Unidas" que:

- *reconoce* que las prácticas comerciales restrictivas pueden repercutir en forma adversa sobre el comercio internacional, particularmente el de los países en desarrollo, y sobre el desarrollo económico de esos países;
- que además s*e afirma* que un conjunto de principios y normas equitativos convenidos multilateralmente para el control de las prácticas comerciales restrictivas puede contribuir al logro del objetivo, en el establecimiento de un nuevo orden económico internacional, de eliminar las prácticas comerciales restrictivas que repercuten en forma desfavorable sobre el comercio internacional, y contribuir así al desarrollo y al mejoramiento de las relaciones económicas internacionales sobre una base justa y equitativa;
- *que reconociendo también* la necesidad de asegurar que las prácticas comerciales restrictivas no impidan ni anulen la consecución de los beneficios a que debería dar lugar la liberalización de las barreras arancelarias y no arancelarias que afectan al comercio internacional, en particular las que afectan al comercio y al desarrollo de los países en desarrollo.

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[1] Sección F Medidas Internacionales.-
4. Consultas:
a) Cuando un Estado, particularmente en el caso de un país en desarrollo, considere procedente celebrar con otro Estado u otros Estados consultas sobre un problema relativo al control de las prácticas comerciales restrictivas, podrá pedir una consulta con esos Estados a fin de hallar una solución mutuamente aceptable; cuando haya de celebrarse una consulta, los Estados participantes podrán pedir al Secretario General de la UNCTAD que proporcione a tal efecto servicios de conferencia mutuamente convenidos;
b) Los Estados deberían conceder plena atención a las peticiones de consulta y, previo acuerdo sobre el tema y los procedimientos de tal consulta, ésta debería celebrarse en el momento oportuno;
c) Si convienen en ello, los Estados participantes deberían preparar, con la asistencia, si la desean, de la secretaría de la UNCTAD, un informe conjunto sobre las consultas y sus resultados, informe que debería ponerse a disposición del Secretario General de la UNCTAD para su inclusión en el informe anual sobre prácticas comerciales restrictivas.

Las anteriores consideraciones constituyen la justificación de fondo para que los países y grupos regionales nos aboquemos y unamos nuestros esfuerzos, mediante el establecimiento de redes de intercambio de información no confidencial para facilitar la cooperación en el combate a las prácticas comerciales restrictivas de la competencia y el libre comercio. He aquí la suprema importancia de los beneficios, que eventualmente se deriven, de las redes de intercambio de información no confidencial para facilitar la cooperación.

La presente contribución de la Corte Centroamericana de Justicia trata de esbozar y delinear argumentos que, partiendo de la hipótesis, a saber: *que las disposiciones y normativas de carácter jurídico sobre libre comercio, obtenidos mediante los tratados y acuerdos comerciales multilaterales y regionales, no han sido suficientes, en sí mismos, para obtener los beneficios esperados por los estados suscriptores, que se materialicen a favor del bienestar de sus ciudadanos debido al menoscabo que resulta de las prácticas comerciales restrictiva*, contribuyan a responder dos preguntas fundamentales:

a) Qué instrumentos están actualmente disponibles para manejar y resolver, desde un esfuerzo gradual y perpetuo la hipótesis "indeseable" antes planteada;
b) Cuales son los beneficios de las redes de intercambio de información no confidencial para facilitar la cooperación.

Los instrumentos actualmente disponibles los encontramos en diferentes ámbitos de carácter formal e informal; diferentes contextos de naturaleza asociativa; y diferentes ordenamientos jurídicos. La siguiente es una propuesta de clasificación, solamente para efectos de esta contribución:

- Instrumentos formales e informales de cooperación e intercambio de información entre agencias de competencia
    - Bilaterales
    - Plurilaterales
- Instrumentos formales contenidos en ordenamientos jurídicos de Derecho Internacional
    - Tratados internacionales de cooperación con base jurídica

    - Tratados y acuerdos comerciales
- Instrumentos de Derecho Comunitario
    - Normativas y disposiciones jurídicas derivadas especializadas

Instrumentos bilaterales, entre agencias de competencia, con disposiciones formales e informales para el intercambio de información: Los convenios, acuerdos y memorándum de asistencia técnica suscrito por La Superintendencia de Competencia de El Salvador y las agencias de competencia de Chile, Perú, Panamá, Méjico, Costa Rica, Honduras y Nicaragua son una muestra representativa de instrumentos disponibles para manejar casos de prácticas anticompetitivos con efectos transfronterizos.

En sus contenidos normativos, dichos instrumentos varían en intensidad y profundidad en razón de los intereses y lazos comerciales existentes entre las partes. Por tal razón encontramos instrumentos de alcance y trascendencia limitados, en cuanto a los compromisos que se adquieren, tal es el caso del Memorándum de Asistencia Técnica entre la Fiscalía Nacional Económica de Chile y la Superintendencia de El Salvador que se limita únicamente a regular la asistencia técnica mutua, señalando áreas de interés común.

Los convenios de El Salvador con Méjico, Panamá y Perú tienen por objeto regular la asistencia técnica mutua, situando a El Salvador, principalmente, como país receptor de la cooperación técnica. Dicha asistencia incluye intercambio de personal y funcionarios, seminarios y otros eventos de capacitación, pasantías. En artículo aparte se establecen los procesos de consulta mutua sobre áreas de interés común, relativas a la prevención de prácticas anticompetitivas que puedan tener efectos en sus territorios; estos procesos de consulta se pueden dar de forma formal e informal. Además se aborda el tema de la Abogacía de la Competencia, como un área de interés, al cual se le releva por la importancia que tienen sus efectos positivos en la comunidad empresarial.

A la vez encontramos convenios con mayores grados de compromiso entre agencias a fin de promover la competencia y combatir las prácticas anticompetitivas en sus mercados domésticos cuando se vea afectada la competencia en los mercados de la

otra Parte. Nos referimos a los convenios bilaterales de El Salvador con Costa Rica, Honduras y Nicaragua, por separado. Esto es comprensible en vista del grado de avance de la integración centroamericana, no solo en los aspectos comerciales, sino en otros de naturaleza social, cultural, medioambiental, energética etc.

El contenido de estos convenios de amplio alcance se resume así:

- Se establecen las bases de una coordinación interinstitucional y mecanismos permanentes a fin de asegurar que los beneficios de la liberalización comercial no se vean menoscabados por las prácticas anticompetitivas.
- Ayuda mutua para prevenir e identificar prácticas restrictivas de la competencia.
- Ejecución de acciones coordinadas para asegurar la competencia en diferentes mercados.
- Auxilio mutuo para la aplicación de la ley.
- Auxilio mutuo a fin de localización y obtención de pruebas relativas a prácticas antijurídicas.
- Información mutua sobre actos de aplicación de la ley, relativa a prácticas que puedan tener efectos negativos en la competencia en territorio de la otra parte.
- Facilitación para la obtención de información pertinente de alcance público.
- Se regula la confidencialidad de la información.

Instrumentos con naturaleza de Derecho Internacional: tratados y acuerdos libre comercio: Un caso representativo de esta clase de instrumentos lo encontramos en el TLC de Chile y Corea del Sur de Abril del 2004.[2] El principal objetivo del

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[2] **Artículo 14.6: Intercambio de Información y Confidencialidad** TLC Chile Corea del Sur de Abril del 2004

1. Para facilitar la aplicación efectiva de sus leyes de competencia respectivas, las autoridades de competencia podrán intercambiar información no confidencial.

2. Para mejorar la transparencia, y sin perjuicio de las reglas y normas de confidencialidad aplicables en cada Parte, éstas se comprometen a intercambiar información relativa a las sanciones y medidas correctoras aplicadas en los casos que, según la autoridad de competencia de que se trate, estén afectando de forma significativa a intereses importantes de la otra Parte, y a proporcionar los fundamentos sobre los que se adoptaron esas acciones, cuando lo solicite la autoridad de competencia de la otra Parte.

intercambio de información entre las Partes es la aplicación efectiva de sus leyes de competencia, mediante la aplicación del principio de la transparencia, respetando las reglas sobre confidencialidad de la información. Sin embargo las autoridades de competencia de ambas partes podrán intercambiar información confidencial comprometiéndose a no revelarla sin autorización expresa. El tratado contempla además compromisos de asistencia técnica mutua.

En el ámbito del Derecho Comunitario Centroamericano, aun se carece de una normativa derivada de los tratados constitutivos, en materia de competencia, no obstante como se dijo al inicio de esta contribución, existen los fundamentos de naturaleza constitucional para transitar gradualmente hacia la obtención de una normativa regional que establezca una estructura institucional, con su correspondiente normativa sustantiva y procedimental, que dote a la región de mecanismos eficaces que permitan mejorar las condiciones de libre competencia en Centroamérica.

Las analogías y la técnica del benchmarking contribuyen a encontrar modelos y técnicas metodológicas que nos encaminen a la adopción de instrumentos y mecanismos jurídicos de intercambio de información. Los modelos de instrumentos de cooperación propuestos por la OCDE[3], pueden resultar de interés para mejorar los

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3. Todos los intercambios de información estarán sujetos a las normas de confidencialidad aplicables en cada Parte. No se podrá facilitar información confidencial cuya divulgación esté expresamente prohibida o que, de divulgarse, pudiere afectar adversamente el interés de las Partes sin el consentimiento expreso de quien suministra la información.

4. Cada autoridad de competencia mantendrá la confidencialidad de cualquier información que la otra autoridad de competencia le suministre en forma confidencial y no revelará esa información a ninguna entidad que no esté autorizada por la autoridad de competencia que proporcionó la información.

5. Sin perjuicio de las disposiciones citadas en los párrafos anteriores de este Artículo, cuando así lo dispongan las leyes de una Parte, se podrá facilitar información confidencial a sus respectivos tribunales de justicia, con tal de que la confidencialidad sea conservada por dichos tribunales de justicia.

Artículo 14.7: Asistencia Técnica

Las Partes podrán prestarse asistencia técnica mutua a fin de aprovechar sus experiencias y reforzar la aplicación de su legislación y política de competencia.

[3] Descripción de las diferentes modalidades o instrumentos de cooperación, según la OCDE:

- La cortesía negativa es un principio por el que un país debe: (i) notificar a otros países cuando sus procedimientos de aplicación les pueden afectar intereses importantes, y (ii) examinar cabalmente y con comprensión los posibles modos de atender sus necesidades en materia de aplicación sin perjudicar tales intereses.

ya existentes en nuestra región. No obstante el factor de mayor importancia es la voluntad política de los gobiernos lo que producirá los resultados que nos están siendo demandados por los ciudadanos ~~y consumidores~~ de nuestro países.

Las analogías basadas en disciplinas diferentes a la competencia como los instrumentos de intercambio de información en materia fiscal, migratoria, de salubridad pública y otros de naturaleza policial y seguridad, pueden ser útiles. Los instrumentos para el intercambio de información, en estas disciplinas son de carácter fundamental para el funcionamiento de estos sistemas, realmente la información lo es todo, sin intercambio de información no se generan los resultados que se esperan. De igual forma, si se pretende reducir los daños a la competencia en áreas de integración comercial, mediante la investigación y sanción de prácticas anticompetitivas transfronterizas, estas acciones deben sustentarse en el intercambio de información.

Una analogía con mucha aproximación al tema de la investigación de prácticas anticompetitivas con efectos transfronterizos, resulta ser el tema de las prácticas desleales de comercio internacional, cuyo tratamiento cobra especial importancia en las áreas de integración económica y áreas regionales de comercio. Los procedimientos de investigación de estas prácticas, definitivamente, resultan infructuosos cuando estos carecen de mecanismos de intercambio de información.

A manera de conclusión podemos afirmar que: La tendencia de incorporar políticas de competencia en los tratados de libre comercio y los diferentes modelos de integración regional se ha intensificado no solo en los países de América Latina y el Caribe, sino en el ámbito global tal y como lo muestran los abundantes informes de UNCTAD y OCDE, por ejemplo. A la par de este fenómeno en desarrollo, también se ha

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- La asistencia en materia de investigación es una cooperación en la aplicación de la legislación de otro país y puede incluir recopilación de información en nombre del país solicitante o intercambio de información con dicho país, entre otras.
- La cortesía positiva es el principio por el que un país debe: (i) examinar cabalmente y con comprensión la petición de otro país de que inicie o amplíe un procedimiento de aplicación de la legislación con el fin de corregir una conducta en su territorio que afecta sustancial y desfavorablemente a los intereses de ese otro país, y (ii) adoptar las medidas correctivas que considere apropiadas, con carácter voluntario y teniendo presentes sus intereses legítimos. (OECD, 2002: pp.19-22).

producido un visible progreso y fortalecimiento institucional en el ámbito nacional, lo que de alguna forma prepara a los países para asumir compromisos regionales.

La adopción de normativas regionales en materia de política de competencia y su consecuente adopción de redes de intercambio de información no confidencial para facilitar la cooperación se justifica por argumentos como:

a) la necesidad de dar tratamiento a las prácticas anticompetitivas de naturaleza transfronteriza en donde se involucran agentes de mercados foráneos, en vista de la imposibilidad de acceder a medios de prueba y evidencia de la práctica originada en el extranjero.

b) evitar en la medida de lo posible que los beneficios derivados de la liberalización comercial y el libre tránsito de capitales e inversiones no sean menoscabados por prácticas anticompetitivas, especialmente en las regiones, en donde el grado de integración ha llegado a estadios de desarrollo importantes, tal es el caso de la Unión Aduanera Centroamericana.

Por otro lado los mecanismos de defensa comercial tradicionales: antidumping y salvaguardias, no han sido tan eficientes como se deseara; en cambio la Política de Competencia puede contribuir a mejorar las condiciones para un comercio libre de prácticas desleales de comercio.

Por último debe mencionarse que la implementación de una política de competencia común lo que debería incluir la adopción de mecanismos de intercambio de información y el establecimiento de redes de cooperación, en el caso de Centroamérica, vendría a fortalecer la gestión de la política a lo interno de los países, en vista de los buenos resultados, en materia de cooperación y coordinación que se derivan en el ámbito regional, la armonización misma de las normativas nacionales y el grado de credibilidad que se ganaría frente a los consumidores y demás agentes económicos que operan en la región.

El aporte que el Sistema de la Integración Centroamericana brinde a la libre circulación de mercancías, prestación de servicio y tránsito de personas, depende de manera importante en la seguridad jurídica y en la tutela del estado de derecho comunitario. Este pues es el papel de la Corte Centroamericana de Justicia y con este aporte pretendemos abrir el debate para una necesaria discusión en la región centroamericana sobre estos temas.

Costa-Rica

This is a contribution to the Sixth Conference of the United Nations to review All Aspects of the Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. The contribution is specifically referred to the Consultations contemplated in Section F.4 of the Set.1 This is perhaps the one topic of the Set that has been least explored and discussed, and yet it has a great potential. It is true that cooperation among competition authorities has increased over the past ten to fifteen years, especially in the form of technical assistance and experience sharing. More advanced agencies have also found ways to cooperate in investigations. Many countries that have entered into trade agreements have introduced competition provisions. Although some of these agreements have a good level of detail in the type of conducts that would be considered anticompetitive, and some of them even create a regional authority to investigate and issue binding resolutions; there is still a long way to go.

Many countries have not entered into agreements with that level of detail and some of the trade agreements contain provisions on competition that are limited to the exchange of non confidential information. Fighting transborder anticompetitive conducts is very difficult, and it is more difficult if there is not a preexistent commitment between the authorities in the respective jurisdictions to cooperate with each other or to jointly carry on the investigation of alleged anticompetitive conducts.

As globalization continues to spread out, barriers fall down and international trade increases, expectations over the benefits of open markets are also higher. However, lowering duties and other trade barriers may not be enough to capture all the benefits of liberalization because as we all know anticompetitive conducts may hinder competition, and without competition the stimulus sought by liberalization might be ineffective. In other words, liberalization alone is not enough.

Even with lower barriers, competition may no increase because enterprises might choose not to compete in different markets and instead enter into a market sharing cartel at regional level, a competitor might see entry barriers levied by the incumbent through exclusive agreements with local distributors, potential competitors may

choose to merge and form a regional enterprise, instead of competing individually. These are just a few examples of conduct that may frustrate the realization of the benefits that come from liberalization and that a local agency would find extremely difficult to investigate and challenge without cooperation from the agencies of other countries.

The objectives of the Set are clearly related to the concerns expressed above. That is an indication of the vision of the Set, issued in 1980, when liberalization was only starting. This vision has been reinstated in every subsequent review of the Set and in the Accra Accord of 2008. Objectives 1 to 4 of the Set particularly point out to conducts that may affect the trade and development of the developing countries. They also refer to the need to attain greater efficiency and promote social welfare in general and in particularly in the developing countries.

Developing countries are often thought to be more vulnerable to the dominant position that transnational corporations might acquire, or already enjoy in their markets. But in many developing countries where liberalization has been very slow, or has happened only in some industries, it is usually a local enterprise the one that might enjoy a dominant position in the local market, or even at a regional level. Thus cooperation to investigate anticompetitive conducts is important not only from the agencies of the developed countries, but also between the agencies of developing countries among themselves. At this stage of development of many agencies cooperation may be the only way to investigate anticompetitive conducts with trans border effects.

Globalization cannot be stopped, but it can be slowed down and be made unfair. Thus, there is a need to make globalization more efficient and more equitable. At a global level it seems that trade negotiations will not include a comprehensive competition component in the near future. Thus regional and bilateral trade agreements are very important to this end, but they rarely include competition provisions, and when they do, they are often limited to the exchange of non confidential information, which is insufficient to challenge anticompetitive conducts with trans border effects.

In this context, the set is the only fully multilaterally agreed instrument on the competition law and policy in existence, and it is not tied to any trade agreement. This means that the scope of its application may be much broader.

The discussion of whether the Set constitutes a body of soft law is irrelevant for the analysis of the consultations provided for in Section F.4). Such consultations are clearly voluntary obviously for the filing State, but also for the requested State. This means that a State cannot be forced to entered into this type of consultations. However, the implementation of voluntary consultations provided for in Section F of the Set is a venue that might facilitate the investigation and dismantling of anticompetitive conducts that have cross border effects. In spite of this, the Consultations of the Set are widely unknown and it seems that they have been put into motion only once many years ago.

The voluntary nature of the Consultations might help to explain this extremely limited resort to them. But taking into consideration that for many countries the Consultations is the only available venue to seek cooperation, it is worth exploring what needs to be done in order to make these consultations a more practical way to seek cooperation between competition agencies that may be interested in the same alleged anticompetitive conduct or that may require cooperation from an agency in a different country. The possible role of UNCTAD in such Consultations may also be a key element.

Cooperation between competition agencies may be easier to implement if there was more convergence of national laws because this ensure that agencies would be interested in the same type of conducts and would have similar investigative powers and procedures. A clearer definition of what constitutes confidential information would also help because this is usually the first limitation on cooperation. For instance, there should be no discussion regarding sharing information that probes the existence of a cartel. Such information is not proprietary and should not be treated as confidential unless there is a specific law provision on the contrary, as it might be the case of the conditions necessary to stimulate the participation on leniency programs. This would path the way for setting up a framework for information exchange between agencies. Then cooperation should be enhanced to design mechanisms to coordinate investigation in cases where agencies of more than one country are interested on. Another mechanism that would be required is to allow agencies to gather information in their own country to assist in the investigation carried by another agency in a different country. This is only a short list of forms of cooperation to successfully challenge anticompetitive conduct with trans border effects. Other

forms of cooperation may be required depending on the nature of the conduct (i.e. merger control), or the complexity of the case (i.e. economic analysis, efficiencies, etc).

The relevant wording of the Section F.4 states the following:

*"**…4. Consultations**:*

*(a) Where a State, particularly of a developing country, believes that a consultation with another State or States is appropriate in regard to **an issue concerning control of restrictive business practices**, it may request a **consultation** with those States with a view to **finding a mutually acceptable solution.** When a consultation is to be held, the States involved may request the Secretary-General of UNCTAD to provide mutually agreed conference facilities for such a consultation;(b) States should accord **full consideration** to requests for consultations and, upon agreement as to the **subject** of and the **procedures** for such a consultation, the consultation should take place at an appropriate time;*

*(c) If the States involved so agree, a **joint report** on the consultations and their results should be prepared by the States involved and, if they so wish, with the **assistance of the UNCTAD secretariat**, and be made available to the Secretary-General of UNCTAD for inclusion in the annual report on restrictive business practices.*

According to the above, there are the four key elements for the implementation of this provision:

1. An Issue Concerning the Control of “Restrictive Business Practices”:

The content of the term restrictive business practice used in Section F4(a) can be found in Section B(i)1 of the Set. Restrictive business practices are deemed to include inter alia “acts or behavior of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade”. Section D of the Set also elaborates on the meaning of “restrictive business practices”, particularly Sections D3 and D4, concerning horizontal coordinated conduct between enterprises and conduct abusive of market power, respectively. The list contained in Sections D3 and D4 are non-exhaustive, allowing for the addition of further anti-competitive practices.

2. The Nature of Consultations:

Two points can be made with regard to the nature of the consultations. First, it should be emphasized that consultations under the UN Set on Competition are a voluntary mechanism through which States entering negotiations strive to find mutually agreed solutions. Second, while Sections B and D address the actions of private enterprises, the consultations are on a “State-to-State” level. This is in line with the idea that Consultations are of cooperative nature and are not to directly seek the resolution of a case by a third party.

3. Full Consideration to Consultations Requests and Agreement upon the Proceeding and Substance

While consultations are voluntary in nature, member States are required to give full consideration to the request and should be encouraged to enter into the proceeding to explore, and if possible reach, mutually agreeable solutions. If a State declines to participate in the Consultations it would be expected that a reasoned response would be filed to explain its decision. Responses so filed will help to improve future requests and make Consultations more meaningful.

Participation of the corresponding States in the proceedings will strengthen consultation as a valid and effective mechanism by which to address cross-border competition issues. If the States agree to enter into Consultation they have to agree on the subject and on the procedures of the Consultation. The need to agree on the procedures adds to the complexity of the matter because it is one more thing the States have to discuss and agree on, and therefore it does not provide predictability to the parties. Also this would force the Sates to “reinvent the wheel” for every consultation.

Considering the above, the 6th UN Conference may wish to instruct UNCTAD to design a procedure for the implementation of the Consultation; so that States entering into Consultation may agree to use it if they do not want to design and agree on an ad hoc procedures. Enclosed to this contribution is a draft procedure that may serve for discussion if the Conference and UNCTAD so wish.

4. Joint report to be prepared by the states with the assistance of UNCTAD:

Once the requesting State as well as the corresponding State(s) agree on entering into voluntary consultations, the parties may agree on specific mutually reciprocal solutions and this process could be crystallized in a "joint report". In this context, the States may also request UNCTAD assistance in drafting the report. However, given UNCTAD`s expertise and knowledge the States may wish to request its assistance

throughout the process in seeking possible agreeable solutions. The conference may want to instruct UNCTAD to bring such assistance when requested by the States.

As indicated above, if the Member States at this Sixth Review Conference decide to request UNCTAD to make available to them a proceeding for the implementation of the Consultations it must be kept in mind that such proceeding will be optional to the States entering into consultations. In other words, the States may agree on different procedures. If the States decide to do so, they should still be able to get assistance from UNCTAD. Secondly, the proceeding should be as simple as possible with basic signals to light the path for the States to explore and reach mutually agreeable solutions. The proceeding must be respectful of local laws. States entering into consultations will try to find mutually agreeable solutions that are also consistent with their own local law.

While some States may be able to share confidential information, the proceedings must also guarantee such confidentiality. UNCTAD may assist the States in the definition of what information should or should not be shared or in ways to present information while preserving the confidential component, if the States request such assistance.

Finally, the proceedings should be to implement Consultations as a cooperation procedure, not as a conflict resolution forum. It also follows that UNCTAD may provide conference facilities and assistance if the States request so, but UNCTAD shall not act as a judge, nor as an arbitrator.

In sum, implementation of the consultations contemplated in Section F.4. of the Set may help to achieve the cooperation required between competition agencies in different countries to fight anticompetitive conducts with trans border effects. Efforts should be made to disseminate the content and scope of Section F. of the Set. Such efforts may be facilitated by drafting a proceeding for the implementation of the consultations which will give the consultations more predictability and reduce the number of matters the States have to discuss and agree on to enter into consultations. Thus, drafting of such proceedings and a thorough review and discussion seems like a reasonable next step. These efforts however, should not come at the expense of other initiatives to seek cooperation in other ways or to improve the nature and scope of competition provisions in trade agreements. Based on the above this contribution concludes with the submission of the enclosed "Suggested Procedural Guidelines for

proceedings under Section F.4 of the Set” for review and discussion of the Member States.

Dominican Republic

El crecimiento económico y social de una nación es la meta social y política a que aspiran sus nacionales. Para ello, es fundamental el papel del Estado mediante la formulación de políticas. Es así que para un desarrollo adecuado las políticas macroeconómicas, deben estar orientadas a promover el crecimiento, la estabilidad económica, la inversión y el empleo, considerando el trabajo decente como un eje transversal en todo ello.

En países cuyos mercados se encuentran en desarrollo o en transición , es importante la participación del Estado instrumentando políticas que contribuyan al aumento de la producción, enfatizando la utilización de mecanismos novedosos tales como innovación para explorar nuevas actividades; diversificación y aumento de valor añadido a productos interno tradicionales y la modificación de tales productos, lo que a su vez pueda impulsar la acumulación de capital y la reducción de la pobreza.

Ahora bien, esta ampliamente demostrado que el crecimiento económico no necesariamente implica la reducción de la pobreza y la desigualdad en las naciones, por lo que se necesita la formulación y aplicación de políticas que promuevan el desarrollo económico de manera integral, concertada y coherente.

Entre las políticas que promueven el desarrollo económico necesariamente deben contemplarse las políticas de competencia porque contribuyen a un progreso equilibrado, sustentable e incluyente al eliminar múltiples elementos distorsionadores del mercado.

Como en todos los casos de formulación de políticas, al momento de formular las correspondientes a la competencia deben ser tomadas en cuenta las características propias de la nación (económicas, financieras y ambientales) en que van a ser aplicadas, en tal sentido, factores como la población, incluyendo su dinámica y ubicación en tal territorio, la disponibilidad de recursos financieros, la concentración o no del poder económico, el desarrollo social y de la fuerza de trabajo, la cercanía o no de centros urbanos con los centros de producción, los recursos naturales de que dispone y su uso, la determinación de la oferta y la demanda, el tamaño de las empresas existentes, su competitividad en el área nacional e internacional, entre otros muchos, pues al considerar estas características, la política de competencia formulada debe ser adecuada y coadyudar al desarrollo económico.

Igualmente, deben ser considerados aspectos territoriales debido a que el territorio conlleva un sentido económico pues es en el donde se establecen las actividades económicas y se estructuran las relaciones sociales de producción y, por lo tanto es en el espacio físico de dicho territorio en el que se generan riquezas y en el que se produce el desarrollo económico. Ahora bien, existe divergencias en el espacio y en la vocación productiva de los territorios y no habiendo condiciones similares, se provoca un desarrollo desigual entre localidades, regiones y naciones que naturalmente deben manifestarse en el nivel de desarrollo de sus mercados. Asimismo, la decisión de las empresas de ubicarse en un lugar del territorio no es aleatoria sino que está asociada con las facilidades que pueda recibir en ese lugar (vías de acceso, servicios, cercanías a los centros poblacionales, etc.) todo lo cual debe ser contemplado en los momentos de la formulación y de la aplicación de la legislación de competencia.

El grado de desarrollo institucional de un país es otro de los factores que deben ser estudiados ampliamente al momento de formular políticas de competencia puesto que esto generará facilidades o dificultades a la actividad productiva.

La necesidad de coordinación de las políticas y normativas nacionales se hace imprescindible para una efectiva aplicación de las normativas de competencia, pues no puede haber otras legislaciones que impidan o dificulten su fin. En tal sentido, los hacedores de políticas públicas deben tener muy claro que barreras de entrada a un mercado, sean estas estructurales (tecnología, costo y demanda), jurídicas (aranceles, derechos de propiedad intelectual y marcas comerciales, monopolios o importantes exenciones legales), burocráticas (facilidades y tiempos para obtener permisos y cumplir formalidades) pueden hacer inefectiva, en la práctica, la legislación de competencia.

Asimismo, la aplicación efectiva de la normativa de competencia se vería seriamente afectada si dicha legislación converge con otras legislaciones que pudiera limitar el acceso de consumidores a fuentes alternativas de abastecimiento o a los proveedores a clientes alternativos lo que obviamente afectaría el mercado relevante.

A manera de ejemplo, en una nación donde no sean efectivos los resguardos a los derechos de propiedad intelectual y marcas (nombres comerciales, logos, etiquetas, signos distintivos, entre otros) la autoridad de Competencia tendrá fuertes dificultades para la aplicación real de sanciones por actos de competencia desleal derivada de casos de confusión con la actividad, productos, nombres, marcas etc. entre un

competidor y otro, obstaculizándose así el efectivo alcance de la legislación de competencia, por razones ajenas a la misma..

El derecho de competencia también se vería obstaculizado por igual, si no existieran de parte de la administración pública en su conjunto (central, autónoma y descentralizada) normas que garanticen la transparencia y otras que permitan que los trámites burocráticos sean simples y efectivos.

El derecho de competencia regula y reordena el mercado y hace compatibles los principios del mercado con los del Estado Social que garantiza su mayor bien, la protección de los consumidores y usuarios, es decir, la protección de toda su población.

Tomando en cuenta todo lo expuesto anteriormente, pudiéramos concluir que el diseño y la aplicación del derecho y política de competencia debe necesariamente variar de país en país para adecuarlo a las condiciones propias de la realidad que debe normar. Ahora bien, tratándose de un derecho que tiene un fin protector per se, los principios generales de este derecho son convergentes en casi todas las legislaciones de los Estados, por lo que todas estas legislaciones deben contemplar en términos generales, por lo menos, los siguientes aspectos; a saber:

1. El interés social como condicionante de la orientación general del Derecho y Políticas de Competencia. Reconociendo y fomentando la libre empresa, comercio e industria y el valor de los agentes económicos por sí mismos, el Estado debe adoptar las medidas que fueren necesarias para evitar los efectos nocivos y restrictivos de acuerdos, decisiones y prácticas contrarias a la libre competencia, de abuso de posición dominante, de actos o conductas considerados abusivos y de la competencia desleal. El espíritu de la Ley debe ser, por tanto, el predominio del interés social sobre la libertad económica individual.

2. Instituciones especializadas encargadas del control de la competencia. La eficacia en la aplicación de la ley y las políticas de competencia está estrechamente vinculada a las características de las instituciones llamadas a aplicarlas. En tal sentido, sería aconsejable establecer mecanismos para dotar a estas instituciones de autonomía y plena capacidad técnica y operativa.

3. Estructura de los ilícitos. Resulta recomendable para el respeto al bienestar general, a la libre empresa, a la propiedad, a la seguridad jurídica y a la transparencia que se establezcan de manera clara la estructura básica de la tipificación de los ilícitos correspondientes a las prácticas o comportamientos comerciales contrarios a la competencia. Esta estructura de ilícitos, debe, sin embargo, ser lo suficientemente amplia como para permitir la evaluación de cada caso particular, por parte de las autoridades encargadas del control de la competencia.

4. Estructura procedimental. Deben quedar establecidos los procedimientos de control, inspección, investigación, instrucción; los plazos y las etapas del procedimiento; la administración de la prueba; la resolución de los expedientes y los recursos, entre otros, respetando los principios fundamentales del debido proceso y la tutela judicial efectiva.

5. Excepciones a la aplicación de la Ley. Siendo la finalidad del Derecho y las políticas de competencia conseguir eliminar los fallos del mercado y, respondiendo este último a múltiples variables y externalidades, hacer falta, en ocasiones, de respuestas que pueden precisar incentivos fiscales, subvenciones o restricciones a alguna actividad económica con el objeto de que se desarrollen nuevos mercados o actividades económicas o bien que por razones de interés público el Estado asuma operaciones económicas con carácter de exclusividad. Esto implicaría la necesidad de que en las leyes de competencia se contemple la posibilidad de excepciones a sus aplicación sustentadas en que el fin último de tales excepciones sería hacer que el mercado funcione y que su actividad se convierta en beneficios económicos reales para los nacionales del país.

En términos generales, las normativas de competencia deben procurar la regulación de los mercados en orden a conseguir la eficiencia económica, teniendo como fin último garantizar el bienestar de los consumidores y para ello, el diseño y la aplicación de la legislación de competencia debe, necesariamente para ser efectiva, responder a las realidades del país en que será aplicada.

En lo que respecta a Republica Dominicana, la Ley 42-08 "**Ley General de Defensa de la Competencia**" tiene como objetivo promover y defender la competencia efectiva para incrementar la eficiencia económica en los mercados de bienes y servicios a fin de generar beneficio y valor a favor de los consumidores y usuarios. Para realizar esos fines examinara los efectos sobre las condiciones de competencia de convenios o acuerdos restrictivos y prácticas contrarias a la libre competencia, la competencia desleal, abuso de posición dominante en el mercado.

La ley indicada, establece la autoridad de competencia nacional que es la "**Comisión Nacional de Defensa de la Competencia**" y además de las funciones regulares de los organismos de competencia, esta ley tiene la facultad de apoyar el desarrollo económico en tanto que realiza una labor activa de promoción de la competencia mediante acciones múltiples tales como apoyar la simplificación de trámites; realizar estudios sectoriales; vigilar las decisiones de otras entidades de la Administración Pública pudiendo sugerir medidas correctivas sobre posibles efectos de esas decisiones contrarios a la competencia; examinar los efectos que a las condiciones de competencia le sean generados por subsidios, incentivos y otras ayudas oficiales, lo que pudiera motivar su supresión o modificación, entre otros.

Cabe señalar que el gobierno de la Republica Dominicana, ha reformulado sus políticas de planificación económica y social. En efecto, mediante leyes y propuestas institucionales ha asumido la articulación de políticas y la creación de condiciones que propicien la sinergia de las acciones públicas y privadas para sustentar un crecimiento sostenido de la economía en los próximos 20 años.

Es así como se plantea hacer realidad nuestra visión país: "**Republica Dominicana es un país prospero, donde se vive con dignidad, seguridad y paz, con igualdad de oportunidades, en el marco de una democracia participativa, ciudadanía responsable e inserción competitiva en la economía global y que aprovecha sus recursos para desarrollarse de forma innovadora y sostenible**"

En tal sentido, las políticas públicas deben orientarse para lograr esa visión país. Por ello, dichas políticas se articularan en atención a cuatro ejes estratégicos con sus correspondientes objetivos y líneas de acción, de los cuales el tercer eje indica que nuestra economía será "**articulada, innovadora y ambientalmente sostenible, con una estructura productiva que genera crecimiento alto y sostenido con empleo decente y se inserta en forma competitiva en la economía global**"

Para asegurar el cumplimiento del citado eje tres, se estableció como objetivo general "**Desarrollar un ambiente favorable a la competitividad y a la innovación**"; y, a la vez, entre los objetivos específicos esta **"Desarrollar un entorno regulador que asegure un clima de inversión y negocios procompetitivo**". Entre las líneas de acción de este objetivo se encuentra "**Impulsar el funcionamiento de los mercados en condiciones de competencia mediante el fortalecimiento del marco regulador e institucional como medio de reducir costos y precios**"

Lo anterior pone de manifiesto el interés en Republica Dominicana de la aplicación efectiva de la legislación de competencia para lo cual, la política de competencia fue consideradas como **Política Nacional Prioritaria,** lo que le permitirá a la Autoridad de Competencia obtener fondos presupuestarios suficientes para llevar a cabo su función. En atención a ello, podemos concluir sosteniendo que Republica Dominicana entiende que para que haya un desarrollo sostenido, se precisan de políticas de competencia dentro de todo el espectro de políticas macroeconómicas y que, por tanto, apoya y promueve dichas políticas, como garantía de la facilitación de una globalización equilibrada, el progreso social y crecimiento con equidad e inclusión.

Jordan

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[illegible]

ÄŦY ƑŧβϸϽ ƑŧŽŽƈ Úƌ ÛhυĬqƑTŧsÚε IƑYƑUʼsllε hυʒƑl Ĭʒ ăqƑTŧsÚε RIβŧHlε IƑĭ‡ŽY hυGsεβŽ ÄŦY hυĬβĭqβŽllε üŽŽyŧ IƒøШŧŧŽŽllε hυĭƶøʒƑŧŧ Uøʒβll βkƈ DŽŽ LjIl ƑŽŽllNj Û!FNJlε ƱFUʼsllε εPlj ÄŦY hυĬβĭqβŽllε βNjq RεβϸÜ ŧPNjŽŽŧÙε εPlj βlP hυĬŧŧqβÙε IƑŧŧNjGβIllε hυIβ] DŽĬG ăqƑTŧsÚε RIβŧHlε hυĬ‡ŽY hυƶεβqG hυĬβĭqβŽllε IDŽƒs KĬΘ ÛƒĭIlNjqNj ƒĭŽŽĭ‡sƌ hυĬŧŧUʼNjllε :ƑNJŽŽljƈ DŽŽ hυĬGƑШĭÜε βƑkÕε DŽŽ qqY ƑNJŧŧY Ăŧŧƶĭƶ hυĬ‡Žyllε Dƶƈ Ălla I‡TNjŧNj ÛDŽĭqyŧ‡ll hυĬ‡ljÙε hυIβ]llεNj

- ĬllƑŧHlƑGNj ÛhυШŧŧŽŽllε IƑĭŽŽIllε YqƑĭRll hUШĭŧŧ ÛhυĭŧŧyŽŽllε IƑIβ]‡ll hυĭβεqÜε ƐĬllƑIŧHlεNj ŧƑŧŧÜε ƐĬllƑIŧ f 2Cq βĭNjøUʼŧll hυƶʒƑŧŽŽllε IƑIβ]llε UʒqNj βƑyƶÙε f ƒ2Cqŧŧε Ălla ăqDĭƶ ăPllε βŽÙε hυĬШƑŧŧÜε YbƒƶIllε Uʒβ .LjG hUʼGŧβŽllε IƑYƑUʼsllεNj ƱFUʼsllε hυĬNjƶ Uʒβ Ĭʒ hυĬƑNJŧŧlε Ĭʒ !Ijƒƶĭƶ ƑŽŽƶ ÛhυƶʒƑŧŽŽllε DŽŽ DƶIDŽŧ‡ll
- YqƑĭR ĬllƑŧHlƑGNj ÛĬDŽllƑyllεNj ĬDŽĭ‡sÜε njNj‡ƶŽŽllε Ä‡Y hυĬ‡ŽyllƒG hυĭŧŽyŽŽllε IƑIβ]‡ll hυĭƶʒƑŧŧHlε Yβqsllε YqƑĭR .IεβqƒTllε

hυŽqCqllε njNj‡ƶŽ Ä‡Y ƒŽNjq βkDŧ ĬŧHlεNj ÛƑNJĭ‡Y ƒsƑyĭNj DŽNjŧŧƑsllε ƑljβuʋΘĭ ĬŧHlεNj IƒƶllƑΘŧ‡ll hUGƶŧllƑG ƑŽƶNj hu‡ŽƑY IƑIβ] hυyGβÙ Ɛúŧθε qT njNjIlG !NjĭŧŧŽŽllÙε hυYƑŧŧT IƑIβ] njqΘa IDŽqsŧ qsʒ Û!qsDŽllε ĂŧŧŧŽŽllε YqNjWJNj .Ɛúŧθε εPlj Ĭʒ hυlĭβ] ƒTĭƈ Ĭlj hυĭIŧ]DŽllε DŽƁG ƒŽŧY Û DŽNjŧŧƑsllε βNjqT üGs Iƶƶŧ ĬŧHlεNj ƱFUʼsllε εPlj Ĭʒ hυIβ]llε LJPlj Ĭʒ bƑIβ]llε DŽĭG hυĭƱCq hυĭsƑ2ŧε qtsyll hUШĭŧŧ Ƶƶŧ qts Ɛúŧθε εPlj Dƶƈ njNjIlllε Ĭʒ qβNj .ƑljβĭʒNj....!NjĭŧŧŽŽllÙε UĭG βƒYƶŬ ĂŧŧqÙε qΘllε qĭqΘŧNj !NjĭŧŧŽŽllÙε hυYƑŧŧT DŽNjƉ] βĭĭƶŧNj !ĭuʋŧ IƑĭƑƩll pllPNj

(33) !øsβ hυʒƑŧŧŽŽllε DŽNjŧŧƑs !ƑIΘƈ 5ĭGUʼŧG βĭRNjllε ĬllFyDŽ Ălla ƒ‡UʼllFG hυĭIŧ]DŽllε hυIβ]llε IT‡Cq qtsNj .hυyGβÙε IƑIβ]llε DŽĭG Ɛúŧθε hυĭ2TŧNj oƶʒNj IƑIβ]llε DŽĭG hυysNjpŽllε hυĭsƑ2ŧÚε üƑUʼGŨ 2004 hυŧƶll

:Ălla hυĭβĭqβŽllε IT‡Cq hυĭqƑTŧsÚεNj hυĭŧŽNjŧŧƑsllε Iƒƶεβqllε qtεqYa qyGNj

- !ƒøuʋŧŽllεNj ƶĭøƶDŧHlε qøtsY DŽøDŽ hυƶʒƑŧŽŽllε DŽNjŧŧƑsll hυ2llƑCqDŽllε ţ NjTŧŧllε hUlεRŨ hυ2‡HDŽŽllε IƑIβ]llε hUGƱFCqpŽ IƒεβƑƑŽŽllε UĭŽШ DŽY ƱFŧŧHŽÚεNj ,hυĭsƑ2ŧÚε bƑƩlldG ĬUCq qNJyŧ !ĭqtsŧNj ,hυyGβllε IƑIβ]llε Ɛúŧθú ĬεƒεÙε .hυƶʒƑŧŽŽllε DŽNjŧŧƑsG hu‡CqpŽllε
- .LjĭƵ hυƶʒƑŧŽŽllε hυĭβΘ DƵƑDŽTll ƒkI DŽY 5Njƶllε hυεβq hyYGƑHDŽ

qyGNj .uʋNjΘ‡ŽŽ üIlG DŽqβÙε Ĭʒ !NjĭŧŧŽŽllÙε UUƱFsDŽ βyƶ qĭqΘŧNj Uʒβ ÛhυĭsƑ2ŧÚε LJPlj ÄθƑHŧŧ !Ijƈ DŽŽ DƵFI qtsNj ƒøyƵŧŧ ĬUʼyŧ ÚNj ƱFUʼsllε hυĭƶʒƑŧŧ ƒ 2Cqlj pŧNUŧƶŽŽllFG βεβTÜε Ä‡Y üŽŽyŧ FNJŧŧƈ qlUNj hυĭsƑ2ŧÚε LJPlj qNjŧŧG hυεβq ÄθƑøŧŧ ÄUʼYƈ ƑŽŽƶ ÛhυĭŧŧyŽŽllε !NjĭŧŧŽŽllÙε IƑIβ] DŽĭG hυƶʒƑŧŽŽllε Uʒβ Ălla hυĭsƑ2ŧÚε bƑƩlla βεβs Pĭ2ŧŧ njqƈ qtsʒ .ƑŽŽƑY .UĭGllε IƑĭŽINj βƑyƶƉG qĭĭsŧHlε Ɛ5Nj qyG %6 ƒβƑsĭ ƑŽŽG βƑyƶÙε ƒ 2CqNj !NjĭŧŧŽŽllÙε βƑyƶƈ Ä‡Y hυĭGƑUĭĭε

huøŧCqpŽllε IƒεβƑƑŽŽllε DŽY Ɛ]l‡ll IƑDŽNj‡yŽŽllε ĬTsŧ Ĭʒ hυƶʒƑŧŽŽllε hυĭβĭqβŽ LjG !Njsŧ ăPllε βNjqŧll ƲƑDŽIŧƶεNj ÄøŧY εβøyHlε ƐqNJG pllPNj ÛhυIŧŽŽŽllε Ĭʒ βIzllεNj RβÙε 5εNjƶƈ üNjΘ ăβΘHlFG IDŽƒs qtsʒ ÛhυƶʒƑŧŽŽllε qYεNjsG KøĭΘ Û5εNjøƶÙε LJPlj Ĭʒ DŽĭŧŽyllε βFUHlε üGs DŽŽ hυƶʒƑŧŽŽllFG hu‡CqpŽ IƒεβƑƑŽŽ ƱNjsNj njqpŽNj 5Njƶllε εPlj Usε‍Nj

Ûúչŧƨƈ ƥɠŧɣĭ ăℙllƈ ƥDŽŨƈ ÛƥƥɠGDž ƥĭʒ ül]ɠ ƥlƨllƈNj ʀƥŨƈ ƥƑɣƨƈ Uʒƥɠ DžNjDŽNjʂĭ hə℟WŧHlƈ ƥƑWŧ f yɠ Džƈ Džĭɠŧ .Džĭŧɣŧƨllƈ DžĭŧƑNJll DžĭŤl‡NJŧƨDŽllƈ hUWƑΘll

høøDŽƑY UʒƑøŧŧDŽNj ŋllƑTøøDž 5ĭʂΘŧ ƥƑGŧYÚƈ DžĭɣɠP Pɑ]ƈ ɑʂ Û2004 huŧŧƨll 33 !sƥ huƨʒƑŧŧDŽlƈ DžNjŧŧƑs Džƈ ƒDŽǴNj huø‡DŽWllƈ ƥƑøWŧHNj ƥlƨøllƈNj ʀƥŨƈ Ĭ‡ɑƑDž ăɑƥNjŧƨDž !Ƒĭʂ Džƈ KĭΘNj ÛhuƨʒƑŧŧ℞DŽlƈ huĭƑDŽΘ Ălla huʒƑTa DžĭŤl‡NJŧƨDŽ‡ll ƥƑøWŧ f øyɠ IƒƨƥƑDŽDž DžDž DžĭŤl‡NJŧƨDŽlƈ huĭƑDŽΘ Ĭʒ !ljƒƨĭ ɛNjƨ ƑNJɣĭɠ ɣɑƑYa ƥƑɣƨƈ ɑĭɑΘ‡ɠ ƑNJɠ DžĭŧDŽƑɣ‡DŽlƈ .ƑljƥƑɣƨƈ Ĭʒ ɣÚƑƐDŽlƈ Ĭʒ huŧkDŽ‡DŽlƈ hə℟WŧHlƈ

!ƒølΘƈ 5øĭǴU‡ DžDž IƒƨƥƑDŽDŽlƈ f yɠ bƑűkŧƨƈ I℟FWƈ Ĭ‡HlƈNj Ûhuƨʒ℞DŽlƈ DžNjŧŧƑs !ƒlΘŬ ɠɑ℞ŧŧƨƈNj ÛLjĭŧ‡YNj ƥøĭ℟Nj ƥɑøTƈ ɑøʂʒ Ûp‡NJŧƨDŽ‡ll huŧŧĭɣDž UʒƑŧŧDž 5ĭʂΘŧ Ălla ăɑƥDŧ I ŧŧƑI ƐPa ÛDžNjŧŧƑsllƈ I ƐP DžDž (6)Nj (5) ɑƈNjDŽlƈ YɑƑDŽlƈ !ƒlΘƈ 5ĭǴU‡ DžDž ƥlƨllƈNj ʀƥŨƈ Ĭ‡ɑƑDž ăɑƥNjŧƨDžNj ƥƑWŧ bƑűkŧƨƈ LjǴWJNjDŽǴ !‡ĭ ɠƥƈƥs YƥƑWHlƈNj huYƑűTllƈ DžĭŧƑølj IƈNjøǴY Ă‡Y YɑɑΘDž ƥƑɣƨƈ UTNjǴ !NJll NƑDžllƑǴ pllPNj Û2004 huŧŧƨll 33 !sƥ huʒƑŧŧDŽlƈ DžNjŧŧƑs (ƈ/6) .ƥNJ]ƈ hukűk ül bƑűkŧƨÚƈ ƈPlj huyWƈƥDž !H Džƈ Ă‡Y ÛDžĭ‡ɑƑDŽlƈ

YɑøŧŧWŨƈ IƒĭTNj‡Nj ƥƑDŽkŧƨÚƈ 5ĭDžɣŧ ƥNjΘDž DžDžT DžɑƥŨƈ Ƒŧŧ‡I YƥɑƑǴDž IllNjƈ ɑʂʒ Ûhuƨʒ℞DŽlƈ huĭDŽljŨ ɠƥuŧŧNj YɑŧŧWŨƈ IƒĭTNj‡ Iɑ]ƈ pllPllNj .DžɑƥŨƈ Ĭʒ ƥƑDŽkŧƨÚƈ huəĭǴ DžĭƨΘ‡Nj ƥƑDŽkŧƨÚƈ ƱNjTNjDŽǴ ƒTƑQ] ƑDŽƑDŽ‡ljƈ huĭŧŧUʼNjllƈ huøWƒΘllƈ Ăø‡YNj ÛƥǴIƈ IƒĭΘűT YƥƑWHlƈNj huYƑűTllƈ YƥƐRNj Ĭʒ huƨʒ℞DŽlƈ huĭƥĭɑDž ŋŧŧDž YƥNjƥT Ă‡Y huĭŧŧUʼNjllƈ IűljDøøDŽNj YƥǴQ] ăP Ĭ2ĭuʷNj ƥɑƑIǴ YɑNjRDŽNj huDŽƑHlƈ huĭllűśŧƨÚƑǴ UHDŽH huʒ℞DŽllƑǴ huTƑQ] huəĭlj bƑ]ŧŧƨa huƨƥƐɑll IƒøĭƽƑƨÚƈ huøΘʒƑIDž Ăølla huʒƑTŪƑǴ ÛΛDžɑllƈ Ă‡Y huGƒƽƥllƈ ƥƑIHΘÚƈ huΘʒƑIDž IÚƑΘ UDž üDŽƑɣ‡ll huĭllƑY huĭDŽ‡Y DžøøNj Ûhuƨøʒ℞DŽlƈ ƐƒøŧŧDŽ pNj‡ƨ ăƈ DžY Ɛ]l‡ll huŧŧDŽĭNJDŽlƈ IƒIƥ]llƈ huGƽƐƥDŽNj huʒ℞DŽllƑǴ hu‡ɑƥDŽlƈ IƒƨllƑΘHlƈNj .huʒ℞DŽllƑǴ hƽ‡ɣ‡DŽlƈ huDŽNJDŽlƈ üəƒƨDŽlƈ üNjΘ huTTɑH‡DŽlƈ ɣƥNj]DŽlƈ bƐɑƨƨaNj ł℞DŽɑŧŧÚƈ huGƽƐƥDŽll ƫ ƑQ] Uĭƥ]ł ƥĭNjøU‡Nj huĭɑƑTłƽÚƈ IƈŧDŽlƈ Ă‡Y uƒƨΘllƈ Ĭʒ huʒ℞DŽlƈ ƥNjɑ Ă‡Y huUĭƨǴ hu‡kDŽƈ Ûa Ĭlj ƑDŽ ƥlP ƑDŽNj IƒøĭllƑƴƨllƈ IɑYƒøƨ ɑøƽNj . ƫ ƑQ] ül]ɠ DžUʼƐNjDŽlƈ huΘ‡TDŽNj !ƑY ül]ɠ huŧŧUʼNjllƈ huΘ‡TDŽlƈ !ɑɑ]ĭ ƑDŽDŽ ƑNJ‡ƑDŽɑ]ɑ] ƥøǴIƈ ɠR℞ƑΘ hƨ2‡‡ɑƥDŽlƈ IƐƥƑDŽkŧƨÚƈ IUʼYƈNj üǴ huʒ℞DŽlƈ ɣƥĭ‡Nj Ă‡Y huʋʒƑΘDŽlƈ Ă‡Y ƑNJllƑIl]ƈ Ă‡l]ɠ huĭɑƑTłƽÚƈ Ĭøʒ huĭƥƑDŽkŧƨÚƈ IƒƨƨƊDŽllƐNj Iƒlƥlllƈ DžDž ƑNJŧŧƐƥƽƈ UDž hullɑƑY huʒ℞DŽDž Ă‡Y üNjTΘllƈ Ă‡Y ƑNJDŽƑƱΘƈ Ɛ‡ɑƥDŽǴ Ĭøʒ huøĭƥPƱ IƐƥĭĭƩ‡ KƐɑΘa Ĭʒ ƥǴIÚƈ ƥkÚƈ ƑNJll DžƑI ɑʂ Ûhuƨʒ℞DŽlƈ huƨƒĭƨ Džƈ ɑƱŧŧ ƥllPǴ Nj Ûhul‡ĐDŽDŽlƈ IƑDŽɑøɑ]llƐNj IƑƱ℟ŧŧDŽlƈ huĭƨʒƑŧŧ‡ DžDž Uʒƥ‡ Ĭ‡HlƐNj ĬŧŧUʼNjllƈ ɑƑTłƽÚƈ ɑƥDŽY ül]‡ Ĭ‡Hlƈ huĭɑƑTłƽÚƈ IƒĭllƑƴƨllƈ f yɠ .ƒĭllNjɑNj ƑĭDŽĭ‡ƨa huĭŧŧUʼNjllƈ

ƒǴ‡UʼDž ŋǴTƈ ɑʂ huĭĐŽNjIΘlƈ IƑĭllƑƴƨllƐNj huĭɑƑTłƽÚƈ IƑƟĭNJllƈ huʒƑI üǴƽ DžĐž DžNjƑƴ‡Hlƈ Džƈ ɑƱŧŧ Ƒŧŧŧđƨʒ LjĭŧYNj huŧƱY UʒɑII ƒĭƨƑƨƈ ƒŧŧIƥ IΘǴTƈ ƑNJŧŧƨŨ IƑĭNjŧƨDŽlƈ Ă‡Yƈ Ălla ƑNJĭʒ bƑƽŧƥÚƐNj huʒ℞DŽlƈ njNjŧƨDŽǴ f NjNJŧŧ‡ll .DžUʼƐNjDŽlƈ huĭɣĐž njNjŧƨDž Uʒƥ Ĭʒ ƑNJ‡ĭĐƥ 5ĭʂΘŧNj ĬŧŧUʼNjllƈ ɑƑTłƽÚƈ

Royaume du Maroc

Le droit et la politique de la concurrence occupent une place importante dans les politiques publiques dans la mesure où l'économie de marché globalisée devient de plus en plus la norme des rapports socio-économiques aussi bien sur le plan interne qu'au niveau des relations internationales ; le but ultime étant, à travers la multiplicité des offres aux meilleurs rapports « Qualité – Prix », d'une part de stimuler l'efficience et la compétitivité économiques, d'autre part d'agir au mieux des intérêts du consommateur. En effet, la nécessité de disposer d'une politique de la Concurrence est considérée aujourd'hui comme une condition sine qua non de la bonne gouvernance économique. Elle est souvent au centre des recommandations prônées par les principales organisations internationales spécialisées. On considère désormais l'implémentation de la politique et du droit de la Concurrence comme faisant partie des responsabilités des gouvernements en les incitant à ouvrer dans le sens de l'amélioration de l'environnement des affaires, de l'ouverture des marchés, de l'encouragement de l'initiative privée et de l'affirmation du rôle régulateur de l'Etat. Est-ce à dire que l'économie de marché et son corollaire la Concurrence deviennent une panacée ne souffrant d'aucune remise en cause ? Loin s'en faut. Beaucoup de penseurs et de décideurs soulèvent la problématique de leurs débordements, notamment en ce qui concerne la problématique des obligations des entreprises en matière de droits humains sur les plans économique et social. Beaucoup d'économistes eux mêmes remettent en cause l'automaticité des équilibres en économie de marché et préconisent la nécessité de sa régulation à cause des débordements observés. Le débat est encore plus vif concernant les pays émergents et la contribution de la politique et du droit de la Concurrence au développement économique. C'est pour ces raisons qu'après un premier point réservé au débat concernant la portée de ces politiques, nous traiterons par la suite de la politique de la concurrence comme levier de développement et présenterons dans un troisième point l'expérience marocaine en la matière.

I- Débat sur la centralité de la politique de la concurrence et les spécificités des économies émergentes

Lorsqu'on se penche sur l'histoire des faits et des idées économiques depuis le début des années quatre vingt et plus particulièrement depuis la chute du mur de Berlin et du système des économies centralisées à partir de 1989, on ne peut que constater l'affirmation planétaire de l'économie de marché et la globalisation de son développement. On considère alors que la concurrence permet la libération des potentialités créatives et l'éradication des rentes non productives. Il n'est pas superflu de rappeler que la théorie libérale d'inspiration classique considère que l'économie de marché permet une allocation optimale et spontanée des ressources par le libre jeu de l'offre et de la demande et ce, aussi bien sur le plan national qu'au niveau international où chaque entreprise, chaque pays profitera de ses propres avantages comparatifs.

Cette vision des choses a été et reste bien entendu contestée par certains économistes et experts qui considèrent que les automatismes dont on parle sont loin de fonctionner spontanément4. Sur le plan interne, dit-on, bon nombre de facteurs et de comportements d'acteurs agissent contre cette spontanéité du marché et du jeu concurrentiel. On parle alors du caractère récurrent des crises dues aux déséquilibres du modèle de répartition des revenus, d'exacerbation des inégalités sociales et de détérioration de l'environnement. La recherche du « moins disant » environnemental et social augmenterait certes l'efficience économique, mais au détriment des droits économiques et sociaux actuels et futurs. Concernant le marché lui-même, on soulève la question du comportement de certains opérateurs qui usent de pratiques anti-concurrentielles. De même, sur le plan international, on considère que les avantages du libre échange ne jouent que dans la situation où tous les acteurs se trouvent à un niveau comparable de développement. Il faut cependant préciser que malgré ces critiques, l'observation des idées et des faits économiques durant les vingt dernières années semble avoir relégué cette vision au second plan et ce, au profit d'un fort positionnement en faveur du marché. Il faudra attendre la crise financièro-économique qui s'est déclenchée en 2008 pour entendre de nouveau des voix qui s'élèvent contre

4 Kirzner. I « Concurrence et processus de marché : quelques repères doctrinaux », édition Economica, 1999.

l'orthodoxie libérale. Ceci dit, personne ne remet fondamentalement en cause l'économie de marché comme système d'agencement des rapports socio-économiques. Ce qui émerge plutôt de la crise, ce sont des positionnements non encore tout à fait clairs vacillant entre le passage à un stade plus avancé de régulation du marché et le retour à des politiques industrielles et sociales qui peuvent contrarier l'orthodoxie concurrentielle. Ces controverses concernant la supériorité du marché ou celle de l'Etat sont encore plus présentes dans les pays en développement où on a souvent tendance, tout en se conformant globalement à l'économie de marché, à pencher du côté interventionniste en mettant en évidence l'indispensable transition avant que les structures socio-économiques ne dégagent des mises à niveau assurant la possibilité de confronter les contraintes de la concurrence en interne et sur le plan international. Ce que l'on peut conclure concernant ces controverses, c'est qu'un encadrement international et national des débordements du marché s'avère indispensable, mais à condition de faire attention à certaines dérives. L'encadrement est déterminant aussi bien en termes économiques qu'en ce qui concerne les droits humains fondamentaux, à condition bien sûr que l'Etat encadreur fasse preuve d'exemplarité. Quant aux entreprises, elles ont intérêt à manifester un engagement volontaire pour que la prise en considération des droits humains représente pour elles non seulement intérêt éthique, mais également politique en termes d'image et de sécurité globale. Il faut cependant accompagner cette vision humaniste par une certaine veille contre les dérapages destructeurs de l'appareil économique. On a ainsi souvent tendance à négliger le fait que les protections qui accompagnent généralement la vision interventionniste sont de nature à générer des rentes qui bloquent l'efficience économique et la génération optimale de richesses. On tombe alors dans une sorte de cercle vicieux ; On recourt à l'interventionnisme et aux protections au détriment de la Concurrence afin de répondre aux impératifs sociaux et de préparer l'émergence économique ; et le fait de protéger aboutit au recul de l'efficience et ne prépare nullement ni à la concurrence, ni au développement. Le deuxième argument qui va à l'encontre des politiques de non concurrence a trait au fait que le droit et l'économie de la Concurrence prévoient eux mêmes des exemptions limitées dans le temps et le champ d'application, exceptions qui permettent justement aux pays en développement, dans certaines limites acceptables, d'être dans la dynamique concurrentielle tout en s'y préparant. Rappelons que ces exceptions concernent aussi bien la dimension sociale avec par exemple les possibilités de subventions des prix des produits de

consommation de base ou de soutien direct par le revenu, que la dimension économique avec des incitations ciblées au profit des PME, des champions nationaux et autres objectifs publics tel que, par exemple, celui assigné par le gouvernement de l'Afrique du Sud à son droit de la Concurrence concernant le développement de l'accès à la propriété des classes sociales désavantagées par l'apartheid.L'essentiel donc est de rester dans la logique du marché et de sa globalisation. N'oublions pas que la mondialisation, qu'on le veuille ou pas, s'impose indépendamment de toute considération. On constate qu'elle profite aux audacieux qui savent s'y adapter. Posons-nous la question suivante: Est-ce que la Chine, l'Inde ou encore le Brésil, l'Afrique du Sud et d'autres pays auraient pu réaliser leur percée sans la mondialisation? La globalisation, avec l'ingéniosité qui accompagne généralement ceux qui l'assument, a fait comprendre qu'il faut troquer les luttes idéologiques traditionnelles des pays en développement, au profit de la compétition par le marché qui permet d'en tirer pleinement profit. A l'inverse, beaucoup de partisans de méthodes révolues ou frileux vis-à-vis des réformes qui s'imposent, perdent leurs rangs dans la globalisation. Le plus étonnant, c'est que même certains pays industrialisés qui conseillaient eux-mêmes aux pays en développement de libéraliser leurs économies, essaient de profiter de ce climat de remise en cause des excès du marché, pour arrêter, contre toute logique, le processus de libre jeu du marché et lutter par exemple contre les délocalisations. Précisons à ce propos que si on a raison d'invoquer dans certains cas le dumping social, on doit également admettre que les bas salaires souvent invoqués peuvent correspondre à la nature objective du tissu économique concerné.En conclusion, la question qui se pose est la suivante : y'a-t-il pour les pays en développement, une troisième voie entre l'économie concurrentielle et l'économie centralisée ? Autrement dit, peut-on considérer que c'est à la politique publique de définir les conditions dans lesquelles la concurrence peut être bénéfique? La réponse ne peut être que positive s'il s'agit de lutter contre certaines dérives du marché et des pratiques anti-concurrentielles auxquelles se livrent quelques opérateurs économiques ou si on se positionne, même avec une approche plus large, dans le cadre des exemptions admises normalement dans la logique du droit et de la politique de la Concurrence. Elle est négative si on fait de ces exceptions des données extensibles et durables et des règles de l'Etat des éléments qui entravent le fonctionnement profond du libre jeu du marché. En effet, l'expérience démontre que certaines interventions gouvernementales peuvent être moins productrices d'effets

positifs que les chances occasionnées par le succès de la concurrence. Il importe notamment de se méfier des tentatives de sauvetage, quasi systématiquement vouées à l'échec, de certaines entreprises vouées à la disparition ou à la restructuration profonde comme il faut également être prudent à l'égard de certaines actions dans les pays en développement qui, sous couvert d'interventionnisme ou d'encadrement, ont pour but de favoriser telle ou telle entreprise.

Bref, il semble que le respect des fondements de l'économie de marché dans le cadre de plus en plus globalisé qu'on vit actuellement, soit déterminant pour l'émergence socio-économique. En somme, ce qui est à mettre en relief, c'est d'examiner comment mieux maitriser les débordements que le marché peut occasionner et non de revenir vers des pratiques qui remettent fondamentalement en cause sa logique.

II- La politique de la concurrence comme levier de l'émergence des pays en développement

Comme on vient de le souligner, si la vision orthodoxe de la politique de la Concurrence peut être génératrice de débordements négatifs sur les plans économique et social, le respect du marché régulé et de la libre concurrence constitue pour l'instant le meilleur système ou du moins le système le moins mauvais d'agencement des rapports sociaux de production. En effet, la concurrence permet l'émergence de facteurs déterminants pour le développement et ce, aussi bien sur le plan éthique que sur les plans social et économique. Cette triple dimension du développement concerne avec plus d'acuité les pays en voie d'émergence.

Concernant d'abord la dimension éthique, force est de constater que le libre jeu de la concurrence écarte toutes les situations de rentes non productives. L'éthique des affaires ainsi recherchée est encore plus importante pour les économies en développement qui restent globalement rentières pour des considérations dues aussi bien à la prédominance des structures oligopolistiques qu'à de possibles connivences ou confusions entre les sphères économiques et politiques. En sévissant contre les pratiques anti-concurrentielles comme par exemple les ententes ou les comportements commerciaux marqués par l'exploitation de positions dominantes sur le marché et les abus qui peuvent en résulter, le droit de la concurrence favorise ce qu'on peut qualifier de «démocratie économique ». En effet, la Concurrence est génératrice de

liberté pour toutes les entreprises quelque soit leur taille, qu'elles soient présentes sur le marché ou qu'elles peuvent potentiellement y pénétrer. A ce titre, faut-il le rappeler, le contrôle des pratiques anticoncurrentielles et des concentrations économiques n'a pas pour vocation d'empêcher les entreprises de rechercher un effet de taille ou d'acquérir un pouvoir de marché, mais de contrôler les abus qui peuvent être commis et de lutter contre les restrictions qui peuvent entacher la concurrence soit par son élimination, soit par sa réduction soit par sa suspension.

Au-delà de cet objectif d'éthique et de démocratie économique, il importe de préciser que le droit et la politique de la concurrence agissent pour le bien-être des consommateurs, dans la mesure où la multiplication des choix offerts, la recherche de la qualité et la réduction des prix augmentent leur pouvoir économique. Il s'agit là d'une dimension sociale très importante. Ce principe n'est cependant pas aussi simple. En effet, malgré cette multiplicité des offres à la qualité la meilleure et au prix le plus bas, ce dernier peut se situer au-delà des capacités de revenus de certaines catégories socioprofessionnelles. Se pose alors pour les pays en développement la question des subventions des prix des produits de première nécessité.

Ces pratiques sont évidemment anticoncurrentielles et improductives. En effet, ces subventions ne bénéficient pas uniquement aux classes sociales les plus défavorisées; de même, elles peuvent générer des rentes au profit des intermédiaires et producteurs sur les marchés en question ; enfin, elles occasionnent des charges budgétaires intolérables pour les finances publiques. Précisons cependant que malgré ces dérives, des exemptions sociales sont tolérées par le droit et l'économie de la Concurrence, mais avec certaines réserves. C'est ainsi que certains pays pratiquent la vérité des prix, mais compensent non pas par les subventions aux prix des produits, mais par des revenus directs ou chèques sociaux attribuées aux plus démunis.

Se pose alors la question du recensement des catégories concernées et des difficultés y afférentes aussi bien en raison des insuffisances de l'appareil statistique que de la corruption qui règne plus ou moins dans certains pays en développement. La réponse à une telle problématique ne peut être que la suivante: l'Etat qui était auparavant impliqué dans le processus de la production n'a plus cette fonction aujourd'hui. Quelle est alors sa raison d'être, sinon d'être régulateur de ces questions? Ainsi donc, la question de la Concurrence face à la problématique sociale est fondamentale

lorsqu'on se penche sur la stratégie de développement à mettre en œuvre dans les pays en recherche d'émergence.

Après, les dimensions éthique et sociale de la Concurrence, nous arrivons à la dimension économique et à sa centralité dans le processus de développement. On peut ainsi relever que lorsqu'ils fonctionnent bien, le droit et la politique de la concurrence favorisent l'efficacité et l'efficience économiques. En effet, Les sociétés et les entreprises n'ont aucune raison de se dépasser si elles ne font face à aucune concurrence et si elles ne subissent aucune pression en ce sens. Ceci dit, il importe de lutter contre les pratiques de certains opérateurs qui utilisent leur richesse et leur pouvoir de marché pour s'assurer une influence déterminante afin de se prémunir contre les inconvénients des pressions concurrentielles, ce qui mine le dynamisme de l'économie et le bien-être du pays dans son ensemble. La concurrence quant à elle, elle a le mérite de pousser sans cesse les entreprises qui veulent conserver leur position sur le marché et de freiner leurs concurrents, à s'améliorer en innovant, en adoptant de nouveaux équipements et produits, en perfectionnant leurs procédés de production, en cherchant des fournisseurs à meilleur marché ou de nouveaux clients, en améliorant enfin les techniques et méthodes de gestion et les compétences des travailleurs. Dans le cadre de cette dynamique, de nouvelles entreprises entrent sur le marché et prospèrent si elles affichent un bon rendement; quant aux entreprises les moins efficaces, elles perdent leur rentabilité et s'évincent ainsi du marché.

Cette dynamique d'ensemble est justement favorisée par la Concurrence, notamment dans les pays en développement où la prédominance des situations oligopolistiques peut générer des rentes non justifiées.

En plus de ces processus qu'on peut qualifier d'internes, il apparaît également évident que la politique de la concurrence constitue un facteur d'intégration dans le commerce international et permet, à travers la compétitivité du tissu économique qu'elle génère, l'acquisition de parts de marchés intéressantes. Certes, la libéralisation des échanges n'a pas permis à tous les pays de générer croissance et développement durable; néanmoins, cela peut être expliqué dans la plupart des cas par l'absence de réformes complémentaires nécessaires pour la réussite de tout processus de libéralisation et d'ouverture économique.

En effet, les pays ne peuvent tirer parti des avantages potentiels de la libéralisation du commerce que s'ils accompagnent cette dynamique par une politique de disponibilité

des facteurs à des coûts raisonnables. Agir sur les ressources humaines par un système éducatif et de formation en amont et une bonne gouvernance en aval devient un véritable pari. Le challenge concerne également le climat des affaires, la recherche, la mise à niveau des entreprises et une offre raisonnable en infrastructures, énergie et télécommunication. Mais tout ceci ne retrouve sa cohérence que par l'adoption d'une politique de concurrence transparente.

III- L'expérience marocaine en matière de politique et de droit de la Concurrence

Au Maroc, le débat sur la concurrence remonte à la deuxième moitié des années soixante dix et au début des années 80 à l'occasion de l'adoption de ce qu'on a appelé à l'époque le programme d'ajustement structurel. En effet, durant le premier quart de siècle qui a suivi l'indépendance en 1956, le Maroc, ouvert officiellement à l'économie du marché, a pratiqué en fait un véritable centralisme économique. Ce positionnement interventionniste, reposant sur un secteur public omniprésent, a permis au début, un degré de croissance assez correct ainsi qu'une relative protection sociale, le tout inscrit dans une logique de marocanisation des affaires ; mais très vite, on a atteint un tel niveau d'inefficience économique, qu'on s'est trouvé confronté, à la fin des années soixante dix, à une situation économique extrêmement grave caractérisée par un quasi blocage de l'appareil productif et la perte des équilibres économiques fondamentaux, ce qui a occasionné d'énormes difficultés de paiement au niveau international. Une telle évolution a été à l'origine du programme d'ajustement structurel préconisé par les institutions monétaires et financières internationales, programme qui a permis de rétablir relativement les équilibres macroéconomiques et ouvert la voie à l'amorce d'une politique économique résolument tournée vers le marché. Ainsi, la libéralisation progressive des prix et du commerce extérieur, menée en parallèle avec un programme de privatisation et de désengagement progressif de l'Etat, est complétée par un nouveau cadre d'incitations susceptibles de favoriser l'investissement. L'adhésion du Maroc aux accords du GATT puis à l'OMC, ainsi que la conclusion de l'accord de partenariat avec l'Europe et de multiples accords de libre échange sont venus sceller cette nouvelle démarche stratégique. Le couronnement de cette orientation était l'adoption, vers la fin des années quatre vingt dix, d'une législation centrée sur la Concurrence et le principe de formation des prix par le

marché. Cette législation qui marque la naissance du droit marocain de la concurrence5, constitue le prolongement logique d'un long processus de réformes entreprises depuis le milieu des années 80 visant à moderniser l'environnement institutionnel, économique et financier des entreprises. Son champ d'application s'étend à toutes les activités de production, de distribution et de services.

Précisons cependant que le modèle de concurrence choisi par le Maroc fait de celle-ci un moyen de développement économique et social et d'amélioration du bien être des consommateurs. Il s'agit d'une vision qui tranche avec celle qui fait de la concurrence un objectif plutôt qu'un moyen. Elle favorise donc le concept de concurrence « praticable » sur celui de concurrence « pure » prônée par le libéralisme classique B.ref, dans le système marocain, la concurrence au niveau des marchés est la règle tout en admettant un certain nombre d'exemptions conformément à ce qui est adopté par beaucoup d'autorités de la Concurrence de par le monde. C'est le cas des incitations en faveur des PME et des champions nationaux. Toutefois, ces exemptions ne sont pas considérées comme une permission inconditionnée donnée aux entreprises pour s'adonner à des pratiques anticoncurrentielles. Bien au contraire, il ya obligation pour tout acteur économique ou commercial de respecter les règles de la concurrence, sauf si les entreprises concernées sont en mesure de démontrer que, par ailleurs, elles compensent les restrictions de la concurrence qu'elles engendrent et réservent aux utilisateurs une partie équitable du profit qui en résulte. C'est dire que la politique économique choisie par le Royaume du Maroc demeure orientée sur l'objectif de concilier le respect des règles de la concurrence comme une norme sacrosainte pour le fonctionnement des marchés avec l'objectif de progrès économique à travers quelques exceptions chaque fois que ledit progrès ne peut être réalisé que par leur biais. Ce qui signifie que pour que la concurrence demeure praticable et puisse livrer toutes ses vertus, on admet qu'il faudrait que les pouvoirs publics créent et améliorent constamment les conditions fondamentales de son fonctionnement à travers la surveillance des structures économiques et des comportements tendant à l'handicaper , qu'il s'agisse alors des comportements des opérateurs ou de l'indispensable neutralité de l'Etat vis à vis des acteurs économiques. Précisons cependant que si la loi marocaine sur la liberté des prix et la Concurrence se positionne positivement par

5 Il s'agit de la loi 06-99 sur la liberté des prix et de la Concurrence du 6 juillet 2000.

rapport aux normes internationales, le Conseil de la Concurrence du Maroc ne bénéficie pas d'un statut correspondant aux objectifs qui sont assignés à cette loi. Il reste fondamentalement consultatif, avec une composante majoritairement publique et sans pouvoir décisionnel ni capacité d'auto-saisine et d'investigation par l'enquête. Tout ceci a fait que le Conseil marocain est resté inactif depuis le début de cette décennie jusqu'en 2008, date de sa réactivation et la nomination de son Président actuel. Outre le fait qu'il a utilisé ses deux années d'existence à se structurer, à contribuer à vulgariser la culture concurrentielle et à répondre aux saisines et demandes d'avis qu'i reçoit, il a travaillé sans relâche sur la présentation et la défense de la réforme de ses structures conformément aux normes internationales. Le planning prévu permettrait au Conseil de devenir une autorité indépendante et décisionnelle à l'horizon 2011

Conclusion

La problématique de la croissance économique et de l'émergence est fondamentale pour les pays en développement comme le Maroc. Dans un monde dominé par l'économie de marchés globalisés, le droit et la politique de la Concurrence occupent évidemment une place de choix. En favorisant l'éthique des affaires, l'efficience économique et le bien être des consommateurs, il ne fait aucun doute que la concurrence constitue un moyen déterminant pour la promotion du développement. Evidemment, la régulation du marché s'impose afin d'en éviter les débordements, mais à condition qu'elle n'entrave pas sa logique profonde. Le Royaume du Maroc s'inscrit parfaitement dans cette démarche à travers les réformes économiques et structurelles entreprises ainsi que le modèle de la concurrence adopté qui répond, sauf en ce qui concerne l'encadrement institutionnel, aux standards internationaux[6] et aux exigences de la loi type de la CNUCED en la matière. C'est pour cette raison que l'effort entrepris actuellement par le Conseil de la Concurrence du Maroc est concentré sur la réforme de son statut et ce, conformément aux normes internationales en la matière. Précisons à cet effet qu'en signant le statut avancé avec L'Union Européenne, le Maroc a affirmé sa volonté de se rapprocher du régime économique

[6] Les articles 6 et 7 de la loi marocaine sur la liberté des prix et de la Concurrence interdisent les pratiques anticoncurrentielles dans les mêmes termes ou presque des articles 101 et 102 du Traité de Fonctionnement de l'Union Européenne – TFUE –

européen dont la politique de la concurrence représente un des piliers fondamentaux. C’est la raison pour laquelle, il est aujourd’hui fondamental d’accélérer la mise sur pied d’une autorité de la Concurrence indépendante dotée du pouvoir décisionnel ainsi que de faculté d’auto-saisine et d’enquête.

Paraguay

Sesión III: La contribución de la política de competencia en la promoción del desarrollo económico

1) Adecuada formulación y aplicación del derecho y la política de la competencia en países cuyos mercados se encuentran en distintas etapas de desarrollo

Para ser eficaz en el apoyo al desarrollo económico, el derecho y política de la competencia deben ser apoyadas por políticas complementarias a favor del desarrollo y ser compatible con éstas.

Un espectro de factores - incluyendo el entorno social, económico y político - dicta las opciones para las disposiciones sobre competencia y el diseño de la aplicación.

Por otra parte, las prioridades adoptadas por los gobiernos en términos de apoyo presupuestario, la disponibilidad de recurso humano adecuado y el apoyo político son determinantes clave de la eficacia de la agencia. A pesar de una cierta tendencia a la convergencia, los Estados tienen que adaptar sus leyes de competencia y las instituciones que la aplican a las condiciones locales.

La falta del derecho y de una política de competencia en Paraguay, un país en vías de desarrollo, pequeño, sin litoral marítimo, con un mercado limitado y concentrado, con barreras naturales, de información y altos costos para operar en los mercados internacionales, puede afectar adversamente su comercio y, por tanto, su productividad y su crecimiento económico.

Al desarrollo económico es mas sencillo enunciarlo que lograrlo, pero tampoco es imposible alcanzarlo. No vasta con declarar al desarrollo en documentos y congresos sino que hay que asumirlo con una estrategia clara y con hechos concretos. El desarrollo económico implica definir un objetivo común de igualdad y dignidad como claves de vida de la gente. El desarrollo económico en el pasado era visto como un privilegio al cual algunos de nuestros países no tenían derecho a acceder por estar destinados de manera manifiesta a la dependencia y a la pobreza. Hoy día aceptamos que el desarrollo es un derecho inalienable de los países y existen dos factores indispensables para lograr el mismo que son la democracia y la libertad.

En el complejo escenario internacional no hay modelos perfectos ni instituciones infalibles. La inversión productiva es el elemento esencial para el crecimiento y el

desarrollo económico y social de un país. La estrategia y sustancia del desarrollo económico, para ser sustentable, implica un laborioso proceso de transformaciones estructurales y graduales y requiere objetivos precisos con un rumbo cierto. Entre tales transformaciones, teniendo en cuenta el modelo económico del país, se encuentra la formulación y aplicación del derecho y política de la competencia apropiado a la realidad local.

El futuro órgano de aplicación de la Ley de Competencia de Paraguay, deberá hacer lo mejor dentro de lo posible y desde la identidad propia del país. La agencia debe priorizar recursos y deber estar respaldada por un programa financiero congruente con los niveles de financiamiento disponibles a nivel interno y con la disponibilidad de recursos de organismos multilaterales. Debe tener la capacidad de detectar a nivel interno las vulnerabilidades en el mercado y en el plano productivo, financiero y político que puedan limitar sus márgenes de acción para cumplir sus objetivos y compromisos con la sociedad que le faculta la Ley.

Paraguay necesita realizar las reformas estructurales, modernizar las instituciones, realizar una fuerte inversión publica en materia de puertos, transmisión de energía, infraestructura vial y ferroviaria y mejorar su clima de negocios, entre cuyos indicadores, se encuentra contar con una Ley de Competencia, para promover la atracción de mas inversiones directas al país y así poder aprovechar el viento a favor en lo económico, pronosticado para América Latina en los próximos años.

Si bien la economía paraguaya tiene un alto nivel de apertura comercial altamente especializada en la exportación de recursos naturales y productos primarios, tiene poca diversificación exportadora y además no cuenta con una norma que garantice la competencia en su mercado local, por tanto, esto puede ser costoso para el país en términos de crecimiento económico y en capacidad de supervivencia no solo en los mercados internacionales, sino también en el nacional.

La efectividad de una política de competencia dependerá de varios factores: las políticas macroeconómicas y sectoriales relevantes y la estructura de incentivos asociada, los rasgos institucionales de la entidad de aplicación (ejemplo: normas que regulan la conformación, selección y promoción del personal, el nivel de independencia e interrelación con otras organizaciones publico/privadas relacionadas al tema de competencia).

La política de competencia es un tema intersectorial de vital relevancia, al que el gobierno, las empresas y los consumidores, deben prestar mayor atención en Paraguay en especial al abordar reformas económicas de liberalización de mercados, liberalización de precios, desregulación de sectores, privatización, apertura comercial e inversiones extranjeras directas.

En el mundo globalizado y altamente tecnificado de hoy, el factor precio es de menor importancia en relación a los procesos eficientes de producción y la introducción de productos novedosos al mercado, los cuales constituyen el motor de la competitividad y el desarrollo. Sin una competencia sana y dinámica en el mercado nacional, será imposible alcanzar la competitividad en mercados internacionales ni tampoco mantenerla por mucho tiempo a nivel local, y en consecuencia, no se podrá alcanzar el desarrollo económico deseado del país. No se puede ser competitivos nacional o internacionalmente, si las empresas no están sometidos a la presión de la competencia en el mercado domestico que les posibilite poder ser eficientes y dinámicas.

Consideramos que mientras más pequeño sea el mercado nacional (en relación a las demás economías de la región –MERCOSUR-), más necesario se hace contar con una adecuada política de competencia, tanto para la defensa del consumidor como para fortalecer la competitividad de la producción paraguaya.

La política de la competencia en Paraguay deberá constituir uno de los instrumentos esenciales de la política económica de desarrollo, y tendrá dos grandes virtudes: la de garantizar a los consumidores una diversificada opción de bienes y servicios en las mejores condiciones de calidad y precio, y la de estimular a las empresas a que racionalicen al máximo sus costos de producción y de distribución para adaptarse al progreso técnico y científico.

La política de la competencia tiene como objetivo principal maximizar la eficiencia económica lo cual contribuye a maximizar el bienestar del consumidor. Una adecuada normativa de defensa de la competencia debe propiciar una mayor eficiencia y equidad, es decir cumplir las metas microeconómicas del país, tomando en cuenta las numerosas “fallas del mercado” existentes.

No se debe caer en simplificaciones, sin duda la competencia es un aspecto importante del desarrollo económico, pero la política de competencia por si sola, no es suficiente para solucionar el problema de cómo crecer. También se requiere de

inversiones y crear un entorno macroeconómico favorable para emprendimientos empresariales. La política de competencia tampoco por si sola no es suficiente para mejorar la competitividad. La competitividad requiere además, flujos de capital y aplicación de determinadas medidas para alentar el ingreso de capitales, y garantizar la aplicación de normas de propiedad intelectual, normas de libre competencia y liberalización bancaria, entre otros.

Mantenemos factores aislados nos deben convertirse “en fines” en si mismos. El crecimiento económico es el eje central del desarrollo de un país y ahora asociado a la apertura económica para exportar mas y recibir mas inversiones externas. A fin de que este modelo funcione, creemos que la política de competencia resulta esencial.

Rwanda

1.0 Background

Since 1995, Rwanda has implemented a bold programme which is socio-political reforms, aimed at improving justice, governance, human resource development and democratisation this has been in parallel with economic reforms, including privatisation of state-owned enterprises, financial and banking sector reforms, improved public financial management and civil service reform.

Modernisation of legislative and regulatory framework for trade and investment, with the aim of fostering a modern and competitive private sector to expect Rwanda's economy to become «private sector led" by 2020.

Currently the Internal Trade Law of 2001 deals with Competition issues, this law prohibits some anti competitive practices such as "maneuvering" and "trickery" as well as price fixing but it is inadequate and full of gaps like:

- Does not provide an institutional framework
- Does not prohibit all kinds of anti competitive activities
- Terms are not clearly defined etc
- It has been difficult to implement in terms of competition regulation

The gaps in competition and consumer protection policy in Rwanda created opportunities for some sectors of the business community to engage in unfair business practices as well as monopolies and cartels which are extremely damaging the growth and productivity of the private sector.

Businesses can engage in a number of acts that restrict the choice of Rwandan consumers by misrepresenting goods sold, not delivering a service that was promised and paid for, or distorting the market with the aim of raising prices.

2.0 Current state of Competition and consumer protection policy Vision & objectives

Rwandan Government is committed on promoting a fair and equitable environment where producer and consumer can maximize their profit and satisfaction respectively. Recently, the Government in Cooperation with UNCTAD has developed Competition

Policy and law both of them have been adopted by Cabinet while the Law is to be enactment by parliament in near future.

The Competition and Consumer Protection Draft Act provides the legal framework for ensuring that fairness and competition are promoted in the eyes of the law and Rwandan consumers are protected. Rwanda has many strategic objectives, one of them is to create an enabling environment in which enterprises can operate.
The development of the Competition and consumer protection Policy is crucial to the creation of the proper market conditions for private sector development Promoting competition at home is the best long-term strategy to empower Rwandan firms abroad because Rwanda firms are facing competitive pressures in the national context that are more likely to survive in the extremely competitive international context.

3.0 Objective of the policy

- To set up a body that will enforce Competition Law. The Competition Law itself establishes a body to be known as "the Competition and Consumer Protection functional body under the remit of the Minister for Trade and Industry

- To provide consumers with competitive prices and product choices of the best possible quality.
- To ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy and to promote a greater spread of ownership.
- To provide the incentives to producers within the country for improvement of production and quality products through technical and organisational innovation.
- To enhance the competitiveness of Rwanda enterprises in world markets by exposing them to competition within the country.
- To create a conducive environment to foreign direct investment in the country.
- To promote economic efficiency and enhance consumer choice, encouraging the development of Rwanda's economy.

4.0 Impact of developing Competition policy on business

- The competition policy will attempt to restrict practices which remove competition from the market such as monopoly and cartel
- Competition policy limits the conduct of economic actors to ensure that the benefits of competition are not frustrated by the election of private barriers to trade
- The Competition Policy is to promote economic competitiveness by granting a fair and equitable deal to both the consumer and the supplier. Therefore, the ultimate outcome of the competition and consumer protection policy is to provide a fair business climate in Rwanda.
- The impact on business will therefore depend on the degree to which they violate competition law. otherwise, business will surely benefit from the improved efficiencies and prevention of anti-competitive practices

5.0 Implementation plan

The functional body will be given powers to enable it carry out its functions effectively. The functional body shall be empowered to monitor, control and prohibit acts or behaviour likely to adversely affect competition and fair trading.

The functional body will coordinate with the other Regulatory Agencies with respect to regulating competition in public utilities.

The setting up of the functional body will principally be carried out by Ministry of Trade and Industries and the financial provision for the functional body will be within the Ministry of Trade and Industry's expenditure framework. The Government of Rwanda will continue to cooperate with its partners for Technical assistance in the area of Competition.

6.0 Challenges and Constraints

- The Competition policy is likely to face several challenges and constraints these include:

- General lack of awareness by consumers on the relevance of competition Policy in connection with people's everyday experiences and products with which they are familiar.
- Lack of exposure to gain access to the information that is needed and build the internal capacity to deal effectively with international competition challenges.
- Inadequate Institutions and their independence, separation of functions, adequate Staffing, resource availability and transparency are crucial for the adequate enforcement of competition policy.
- Lack of political will, inefficiency, lack of expertise in the appreciation and implementation of competition laws and resources.
- Fines imposable for breaches of the laws are minimal. Likewise, most punishments are penal in nature, hence, evidence requirements are substantial.
- There is a lack of jurisprudence and judicial experience in hearing competition cases.

Conclusion

Competition has long been recognized as a prerequisite to sustain economic growth because businesses which operate in a competitive environment usually attain an optimum level of efficiency which benefits consumers with lower prices and greater product choices. The competition policy will assist to bring about competitiveness in Rwanda by identifying those aspects that harm consumer welfare, and unnecessary costs, entailing anti-competitive practices, that distorts the economy

SADC

The views and comments expressed in this paper are entirely those of the author and do not necessarily reflect the views of the organization represented.

1.1 The Southern African Development Community (SADC) has been requested to share its experience in the area of Competition Policy, specifically to contribute on the topic "**Modalities for facilitating voluntary consultations among member States and regional groupings, in line with section F of the UN Set**.

1.2 This contribution is based entirely on SADC's experience in implementing the Declaration on Regional Cooperation in Competition Law and Consumer Policy, adopted by Trade Ministers in 2008 and subsequently signed by SADC Heads of State and Government in 2009. The Declaration provides for a cooperation framework in the application of member States' respective national competition laws. The Declaration is the instrument currently in place to facilitate the investigation and elimination of anti-competitive practices that have cross-border effects.

1.3 SADC has been in existence since 1980. It was transformed into a Development Community, in 1992 and now consists of 15 Member States[7]. SADC's agenda, among others is, market integration and development.

1.4 The 15 SADC Member States are at different levels of development and implementation of competition laws and policies. There are currently ten member States with operational competition regimes. The remaining member States are actively preparing their respective competition laws.

1.5 The policy context and background to the development of national competition laws in SADC countries are wider and different. The enforcement experience varies widely. Countries adopted different national competition law models. They differ sharply in terms of both structure and substantive provisions.

[7] Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

1.6 There has been a fair amount of interaction and voluntary cooperation among the agencies, eg technical assistance, exchange of information, etc. Competition agencies have played an increasingly influential[8] role particularly in countries with a long history of enforcement.

1.7 Competition policy is provided for in the SADC Protocol on Trade which came into force in 2000. Article 25 of the Protocol on Trade provides that *Member States shall implement measures within the Community that prohibit unfair business practices and promote competition.*

1.8 The need for a regional competition policy framework came from the realization that competition and consumer protection laws are national but the relevant markets can extend beyond national boundaries. It was also noted that cross-border effects of business activities were increasing with growing integration of SADC economies, market liberalization and globalisation. This brings with it the risk that anti-competitive practices will likewise cross frontiers.

1.9 Studies have shown that cross-border competition problems are widespread in SADC member countries. Some of the anti-competitive practices and unfair trade practices common in the SADC region include;

(i) inability of firms to access supply chains in new/foreign markets,
(ii) regional cartels (price-fixing, market sharing)
(iii) selection of a single distribution channel by a dominant firm,
(iv) deceitful, misleading representations and product safety standards
(v) mergers and acquisitions involving multinational companies operating in more than one SADC country.

1.10 Cartels have been uncovered, and in some cases prosecuted and fined in the fertilizer, steel, pharmaceutical, milling, airline, etc, industries. Most of the firms

[8] Report of the first SADC Regional Training Workshop on Competition Law and Policy, held in Gaborone, Botswana, August 2008. Submissions on the impact of competition law and policy in South Africa, Zambia and Zimbabwe.

involved have subsidiaries in many SADC countries. Allegations of abuse of dominance by big firms operating in SADC countries have been common. There have also been allegations of market allocation arrangements by multinational companies operating in the motor vehicle, cement and other industries. Consumer protection problems include, expired products, substandard goods and counterfeit products flooding the region.

1.11 According to SADC experience, challenges to cooperation and consultations may be posed by; (i) absence of competition laws in some countries, (ii) high costs of investigations, (iii) different priorities, (iv) voluntary nature of cooperation, (v) lack of harmonization of laws and, (vi) confidentiality of information. The agreed co-operation model, for it to be effective, requires the active participation of every competition agency particularly on cases with cross-border effects.

1.12 The objectives of consultations under section F of the Set are noble. A multilateral framework to address cross –border anti-competitive practices arising from the internationalization of business activities is extremely necessary. However, the practical implementation of consultations under section F may be riddled with challenges, including some of those highlighted in above.

1.13 Consultations envisaged under section F of the Set reflect an international desire to fight cross-border problems. Section F requires a degree of altruism, which sometimes is rare in international relations.

1.14 Consultations under section F of the Set have rarely been used, particularly in our region. There are probably two reasons why they have not been used, either section F is not well known or States have no idea on how to conduct consultations in terms of this provision. Whichever the reason may be, there is need for publicity and elaboration of the procedural aspects relating to the consultations eg ground rules to deal with issues such as the notification of cases to other Member States, the exchange of information and co-ordination of investigations.

1.15 Experience has shown that, consultations particularly at regional level tend to be smooth when national laws are harmonized in terms of methods of analysis, assessment, substantive provisions, etc.

1.16 Experience with trade policy, has shown that implementation is smooth when guidelines and procedures are clear and simple. This useful lesson can assist in the elaboration of section F if deemed necessary.

1.17 A useful modality, though not widely used, for facilitating voluntary consultations and fighting cross-border anti-competitive practices among member States, especially those with close economic links and belonging to the same economic grouping is to share information on concluded cases. This will alert other States of likely anti-competitive practices if the same firms operate or have subsidiaries in other neighbouring countries

1.18 Over-arching all these issues is the biggest challenge of conflicting interests of different SADC Member States in the way the law is applied, given their diversity, the different stages of their development, i.e the challenges of bringing together unequal partners.

1.19 SADC Secretariat has already embarked on a process of harmonising the national laws. The first step to contribute to the harmonisation process was the preparation of a Manual for competition authorities or Guide book/Reference book now being used in Member States for case investigation and analysis. The second stage involves preparation of a harmonisation framework.

1.20 Developments taking place within the context of the SADC-EAC-COMESA Tripartite arrangements will have material influence on the future work of SADC in the area of competition policy. The three regional economic groupings have agreed to work together and implement joint programmes in competition policy, trade, customs and economic liberalization, among other areas. The draft tripartite agreement proposed the establishment of a Tripartite Competition Forum. The proposed African Competition Forum is also another related development.

Sénégal

La présente note s'inscrit dans le cadre de la préparation des tables rondes de la sixième conférence des Nations Unies chargée de revoir tous les aspects de l'ensemble de règles et principes équitables convenues au niveau multilatéral pour le contrôle des pratiques commerciales restrictives. Elle s'articule autour de l'application du droit et de la politique de la concurrence au Sénégal (I) et du rôle de la politique de la concurrence dans la promotion du développement économique (II). Les principales questions figurant dans le questionnaire établi par le Secrétariat de la CNUCED ont été répondues dans cette note.

I- Application du droit et de la politique de la concurrence

Le Sénégal est l'un des premiers Etats membres de l'Union Economique et Monétaire Ouest Africaine (UEMOA) à s'être doté d'un droit de la concurrence. En effet, en 1965 déjà, la loi 65-25 du 4 mars 1965 sur les prix et les infractions à la législation économique sanctionnait les ententes ayant pour effet ou pouvant avoir pour effet de restreindre la concurrence sur le marché et prévoyait également la mise en place d'une Commission des ententes chargée d'examiner et d'autoriser, le cas échéant, les ententes ayant un effet positif sur le marché et sur l'efficacité économique.

Cependant c'est seulement en 1994 qu'un droit plus complet de la concurrence a été adopté avec la loi 94-63 du 22 août 1994 sur les prix, la concurrence et le contentieux économique. Ce texte réglementait les pratiques anticoncurrentielles collectives (ententes, concentrations) et individuelles (abus de positions dominantes, refus de vente, pratiques discriminatoires, vente à perte etc.).

La Commission Nationale de la Concurrence a été ainsi créée pour veiller à l'application du droit de la concurrence. Elle a déjà eu à rendre des décisions en matière d'abus de positions dominantes (affaire Air France) d'ententes (affaire CIBA

contre Fédération Sénégalaise des Sociétés d'Assurance), de pratiques anticoncurrentielles (affaire Micro Doses Technologies contre Fernando PRIETO).

Aujourd'hui, sous l'effet de l'intégration économique sous-régionale, la politique et le droit de concurrence sont devenues une matière communautaire.
En effet, les articles 88, 89 et 90 du Traité de l'UEMOA jettent les bases du droit communautaire de la concurrence et sont complétés par les règlements 02/2002/CM/UEMOA, 03/2002/CM/UEMOA et 04/2002/CM/UEMOA et des Directives 01/2002/CM/UEMOA et 02/2002/CM/UEMOA du Conseil des Ministres de l'Union.

La Commission de l'UEMOA est chargée exclusivement de l'instruction des dossiers de concurrence et des sanctions aux infractions au droit communautaire de la concurrence sous le contrôle de la Cour de Justice de l'Union.

A- Sanctions et mesures correctives

Nonobstant les règlements d'exécution et décisions d'exemptions qu'elle peut prendre suite à la notification de projet d'ententes ou de concentration ou d'aides, la Commission peut prendre toute une série de mesures lorsqu'elle constate une infraction au droit communautaire de la concurrence.

Elle peut ainsi prendre des mesures conservatoires dictées par l'urgence avant la décision au fond. Ces mesures ne peuvent intervenir que si la pratique dénoncée porte une atteinte grave, irréparable et immédiate à l'économie générale, ou à celle du secteur intéressé, ou à l'intérêt des consommateurs, ou des concurrents. Les mesures provisoires peuvent consister en toutes mesures nécessaires afin d'assurer l'efficacité d'une éventuelle décision ordonnant, au terme de la procédure, la cessation d'une infraction, notamment :

- l'injonction de revenir à l'état antérieur;
- la suspension de la pratique concernée;
- l'imposition de conditions nécessaires à la prévention de tout effet anticoncurrentiel potentiel.

Les autres sanctions des infractions au droit communautaire de la concurrence sont constituées de sanctions pécuniaires que sont l'amende et l'astreinte. A l'encontre des Etats, la Commission peut prendre des décisions ordonnant la cessation de leurs pratiques anticoncurrentielles ou les aides incompatibles avec le marché commun. Elle peut être appuyée par la Cour de justice de l'Union et la Conférence des Chefs d'Etat pour amener un Etat membre à s'exécuter.

Alors qu'aux Etats Unis, des sanctions pénales sont prises à l'encontre des auteurs d'infractions à la loi antitrust, dans d'autres régions ou pays (UE, France), des mesures de clémence sont adoptées en faveur des acteurs qui se dénoncent ou dénoncent les parties prenantes à une entente. Ces mesures sont d'une efficacité certaine face à la recherche de preuves d'une entente qui est de plus en plus difficile.

Au niveau de l'UEMOA, si la législation communautaire ne prévoit pas, pour le moment, des sanctions pénales, les mesures de clémence peuvent être envisagées par la Commission afin de renforcer le contrôle des ententes qui faussent le libre jeu de la concurrence.

En ce qui concerne le pouvoir décisionnel de la Commission de l'UEMOA, il obéit à une procédure au cours de laquelle les droits de la défense sont sauvegardés. En effet, durant l'instruction des dossiers dont elle se saisit, la Commission procède à des auditions, fait des communications de griefs etc. et met les parties en position de défendre leurs intérêts. Les Etats membres appuient la Commission dans ses enquêtes et vérifications conformément à la Directive 02/2002/CM/UEMOA relative à la coopération entre la Commission et les structures nationales de concurrence.

Par ailleurs, avant toute décision, la Commission doit recueillir l'avis du Comité Consultatif de la concurrence, composé d'experts des Etats membres, qui se prononce sur le projet de Décision de la Commission.

Lorsque la Commission rend une décision en matière de concurrence, son application est obligatoire. Le recours devant la Cour de Justice n'est pas suspensif de l'application de la décision. L'exécution des décisions à l'encontre des entreprises

posent moins de difficultés que celles prononcées contre les Etats. En effet, lorsque les Etats sont concernés, il peut être nécessaire de recourir à des solutions politico-judiciaires pour appliquer les décisions de la Commission en matière d'aides d'Etat ou de pratiques anticoncurrentielles imputables aux Etats.

B- Rôles des tribunaux

Il faut noter qu'au Sénégal, le Conseil d'Etat, devenu la Chambre administrative de la Cour Suprême depuis la réforme institutionnelle de l'organisation judiciaire, a eu à se prononcer sur des décisions de la Commission Nationale de la Concurrence. Ce fut le cas dans l'affaire CIBA/FSSA et dans l'affaire Air France /Syndicat des agences de voyages. Il tirait cette compétence du fait du statut de la Commission de la concurrence qui est une autorité administrative indépendante dont les décisions sont susceptibles de recours devant les juridictions administratives. En outre, les perquisitions dans le cadre d'une enquête de concurrence doivent être faites en relation avec le juge d'instruction.

Cependant, depuis l'entrée en vigueur du droit communautaire de la concurrence, le rôle des juridictions nationales en matière de concurrence est mitigé. En effet, au terme de l'article 90 du Traité de l'UEMOA, la Commission de l'UEMOA est chargée de l'application du droit de la concurrence sous le contrôle de la Cour de justice de l'UEMO. Cette juridiction supranationale est compétente pour les recours des décisions de la Commission de l'UEMOA dont elle apprécie la légalité. Les Commissions Nationales n'ayant plus de pouvoir de décision, il est à noter que les juridictions nationales, hormis le contrôle des procédures d'enquête, sont complètement dessaisies de la matière de concurrence. Elles gardent cependant leur compétence traditionnelle en matière de concurrence déloyale qui est une matière civile.

II- Rôle de la politique de la concurrence dans la promotion du développement économique

Il ne s'agira pas ici de revenir sur les théories économiques de la concurrence et de ses relations avec l'économie. En effet, dans un contexte d'intégration de la plupart des

régions du monde, la nécessité d'une politique et d'un droit de la concurrence pour les Etats, quel que soit leur niveau de développement, n'est plus à démontrer. Il s'y ajoute que la concurrence a sans aucun doute un effet bénéfique pour le consommateur et pour l'économie.

Cette contribution de la concurrence au développement économique passe par l'amélioration de la qualité des biens et services, l'innovation technique et technologique, la baisse des prix et l'augmentation de la consommation et de l'investissement. L'efficacité des entreprises qui en résulte a, par ailleurs, comme corollaire, la création d'emplois et par conséquent la lutte contre la pauvreté.

Dans les pays en voie de développement (PED) et ceux les moins avancés, la politique et le droit de la concurrence doivent être des outils au service du développement économique. Cela, le législateur communautaire l'a bien compris en édictant des règles per se contre les pratiques anticoncurrentielles horizontales et certains comportements des cartels qui ont des effets anticoncurrentielles sur le marché communautaire. Il en est ainsi des ententes et des abus de positions dominantes.

Lorsque ces pratiques sont le fait de multinationales, des règles efficaces doivent être adoptées afin de renforcer leur contrôle sur le plan international. En effet, les pays en voie de développement sont souvent victimes de pratiques concertées des entreprises étrangères qui ont un effet négatif sur leur marché. La révision de l'Ensemble doit par conséquent prendre en charge cette nécessité de renforcer la coopération internationale en matière de concurrence, mais surtout prévoir des mécanismes plus contraignants de coopération lorsque les PED sont en cause. En outre, compte tenu de la faiblesse des moyens de ces Etats et la fragilité de leur marché un traitement différencié est nécessaire en ce qui concerne les obligations mises à leur charge par l'Ensemble.

Par ailleurs, afin de promouvoir l'efficacité et le développement économique dans l'espace UEMOA, certaines pratiques sont autorisées, après examen de leur effet bénéfique sur le marché, par les autorités de la concurrence de l'Union. Ainsi des procédures de notifications et d'exemption ont été aménagées par le droit communautaire de la concurrence. Ces procédures sont applicables aux aides d'Etats

et aux concentrations qui peuvent avoir un effet positif sur le marché et sur les entreprises communautaires.

L'UEMOA a eu, sous ce rapport, à rendre des décisions dont, même si des modèles d'évaluation ne sont pas mis en place, les effets sur le marché communautaires peuvent se traduire en termes de développement des entreprises, de renforcement de la protection du consommateur ou du commerce intra régional. L'ensemble des décisions rendues par la Commission de l'UEMOA l'ont été en matière d'aides d'Etats ou de pratiques anticoncurrentielles imputables aux Etats. On peut citer la Décision 07/COM/UEMOA invitant l'Etat du Sénégal à retirer la norme NS 03-072 modifié sur les huiles de palme, la Décision 08/COM/UEMOA invitant l'Etat du Sénégal à mettre fin aux exonérations de papier Kraft, la Décision 05/COM/UEMOA sur les exonérations sur le clinker au Sénégal etc.

Par ailleurs, dans le cadre de l'intégration sous régionale, la Commission de l'UEMOA conduit, en rapport avec les Etats membres, des politiques sectorielles communes afin d'harmoniser les initiatives au niveau local et de faciliter le processus d'intégration des économies nationales. Il en est ainsi dans le secteur minier, agricole, commercial, etc. où des dispositions ont été prises pour asseoir les objectifs d'intégration régionale. Il se pose dés lors la question des rapports entre le droit communautaire de la concurrence et les politiques sectorielles des Etats qui visent à réaliser des besoins de promotion et de développement.

Dans ce cadre, certains secteurs sont, dans la plupart des Etats membres de l'UEMOA soumis à un régime particulier de concurrence soit du fait d'un monopole naturel soit sur décision des Gouvernements. C'est notamment le cas de la distribution de l'eau, de l'électricité, de la téléphonie fixe etc. Au Sénégal, le secteur de l'électricité, des télécommunications et postes sont régulés par des autorités sectorielles tandis que d'autres comme l'eau, sont sous concessions.

UCL Centre for Law, Economics and Society

Competition policy and development from a legal, institutional and political economy perspective*

I. Introduction

Global governance of competition law and policy remains an important issue for international trade and development[9]. The actions undertaken under the auspices of the U.N. Conference on Trade and Development (UNCTAD)[10] and especially the U.N. Conference on Restrictive Business Practices constitute an essential contribution to this effort.[11]

The history of the UN contribution to global antitrust is well known. The United Nations Conference on Restrictive Business practices was convened with "surprising unanimity"[12] by the General Assembly in its resolution 33/153 of December 20, 1978 under the auspices of UNCTAD[13]. This Conference was the result of five years of work by three *ad hoc* committees of experts, beginning in 1974.[14] In concluding its work, the United Nations Conference on Restrictive Business Practices adopted a resolution, on April 22, 1980, in which it approved a *Set of Multilaterally Agreed*

* The Report partly draws upon previously published research: Ioannis Lianos, The Contribution of the United Nations to Global Antitrust, 15 Tulane Journal of International and Comparative Law 415-463 (2007); Abel Mateus, Competition and Development: Towards an Institutional Foundation for Competition Enforcement, 33 World Competition 275–300 (2010).

9 F. Jenny, Competition Law and Policy: Global Governance Issues, 26(4) World Competition (2003) 609; F. Jenny, Competition, Trade and Development Before and After Cancun, 2003 Annual Proceedings of the Fordham Corporate Law Institute (Juris Publishing, 2004), p. 631.

10 The decision to establish UNCTAD as a permanent organ of the General Assembly was set out in G.A. Resolution 1995, 19 U.N. GAOR Supp. (No. 15) at 1, U.N. Doc. A/5815 (1964).

11 An exhaustive list of UN documents (UNCTAD, General Assembly, ECOSOC) concerned with restrictive business practices prior to the adoption of the Set can be found in L. Foscaneanu, Pratiques Commerciales Restrictives et Droit International (1966-1975), Les Pratiques commerciales restrictives et le droit international, in 10 Annuaire français de droit international 267.

12 J. Davidow, The UNCTAD Restrictive Business Practices Code, 13 Intl Lawyer (1979) 587, at 589.

13 A/RES/33/153, United Nations Conference on Restrictive Business Practices, 20 December 1978.

14 For reports of the three ad hoc committees see U.N. Doc. TD/B/C.2/119/rev. 1 (1974) ; U.N. Doc. TD/B/600, TD/B/C.2/AC.5/6 (1976) ; U.N. Doc. TD/B/C.2/AC.6/18 (1978).

Equitable Principles and Rules for the Control of Restrictive Business Practices (hereinafter UN Set), and transmitted this Set of principles and Rules to the General Assembly for adoption as a resolution.[15] The General Assembly adopted the Set in its resolution 35/63 of December 5, 1980[16], as part of the Programme of Action on the Establishment of a New International Economic Order.[17] The same resolution established an intergovernmental group of experts on restrictive business practices, operating within the framework of a committee of the UNCTAD.[18]

Since the adoption of the Set in 1980, UNCTAD has held a Conference to review the Set every five years, in 1985, 1990, 1995, 2000 and 2005. The Fourth Review Conference in 2000 adopted a resolution in which it reaffirmed the validity of the UN Set, recommended that the General Assembly subtitle the Set for reference as UN Set of Principles and Rules on Competition and recommended that all Member States implement the provisions of the Set.[19] The Fifth Review Conference in 2005 also adopted a resolution reaffirming the validity of the Set[20]. The importance of competition law and policy for international trade and development and the role of the UNCTAD in this process have also been highlighted by the General Assembly resolution 55/182 in 2001[21] and by the UNCTAD's São Paolo consensus in 2004[22].

The United Nations' intervention in the process of internationalization of competition law completes initiatives in other international *fora*, such as the World Trade Organization (WTO), the Organization for Economic Co-operation and Development (OECD) and the International Competition Network (ICN), which along with the numerous bilateral treaties and regional agreements on competition law and policy make international competition law a significant emerging field of law and practice.

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[15] United Nations Conference on Restrictive Business Practices, The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, U.N. Doc. TD/RBP/Conf./10 (1980).
[16] U.N. Doc. A/RES/35/63 (1980).
[17] Resolution 3202 of the General Assembly (S-VI) of May 1 1974.
[18] U.N. Doc. A/RES/35/63, above, footnote 16 point 2.
[19] TD/RBP/CONF.5/15 of 4 October 2000.
[20] TD/RBP/CONF.6/L.5 of 18 November 2005 (The Fifth United Nations Conference to Review all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business practices convened in Antalya, Turkey, the 14-18 November 2005)
[21] A/Res/55/182 of 18 January 2001, para. 27.
[22] TD/410 of 25 June 2004, para. 89, 95, 104.

This study will focus first on the initiatives to develop global competition law standards, in particular the contribution of UNCTAD and of the UN Set. The importance of UNCTAD has been underestimated by commentators, the overwhelming majority focusing on the role of the WTO or the ICN in the process of internationalizing antitrust. The main reason that explains this lack of interest is that the UN Set was thought of not having any binding effect. While there was little doubt in 1980, when the Set was adopted, that it didn't produce any binding effect, the same conclusion may not be reached today. The Set is not a "dead" document, a largely obsolete declaration of intention. On the contrary, its validity has been constantly reaffirmed in subsequent international conferences and is part, twenty-five years after its adoption, of a broader trend, the internationalization of antitrust, conceived as a way to regulate markets that are becoming increasingly global. It is therefore important to re-assess the legal effect of the Set in view of all these recent developments.

After a thorough examination of the legal effect of the Set, we will conclude that the Set is not yet enforceable neither at international nor at national level. At the international level it does not have any binding effect, although it might eventually lead to the slow emergence of an international customary rule against some egregious restrictive business practices. At the national level, it might operate as a source of inspiration for a number of developing countries that have recently adopted competition law statutes (**Section I**).

We examine in the second part of this paper, issues that might arise with regard to the integration of competition policy principles in the legal systems of developing countries. Traditionally, developing countries have attached more importance to industrial policy, rather than to competition policy. There is also the suspicion that, what developed countries aim, in promoting the adoption of competition policy principles for developing countries, is to open developing countries' markets to multinational firms. Both these arguments suffer from serious flaws. First, it is clear that developing countries need to create markets and legal infrastructure for markets to operate well. Competition policy is thus important, even in the presence of infant industry arguments and strong industrial policy concerns. Second, there is the risk that multinationals might employ restrictive business practices with the aim to extend their market power in developing countries' markets to the detriment of national firms. This risk might be avoided precisely by the implementation of competition law.

We will then turn to the relation between competition law and levels of economic and institutional development (**Section II**). The Plan of Action, which was adopted by UNCTAD in February 2000, stressed that the UNCTAD's policy towards an international agreement on restrictive business practices had to take into account the development dimension.[23] In light of this plan, the Fourth Review Conference defined the future mission of UNCTAD in terms of competition issues. The conference suggested a focus on institutional capacity building, competition advocacy, public education, competition studies, and competitiveness and development.[24] The conference also noted "the ways in which possible international agreements on competition might apply to developing countries, including through preferential or differential treatment, with a view to enabling them to introduce and enforce competition law and policy."[25] It is likely that, based on the conference's reasoning, the introduction of SDT in a future international agreement on competition could be one of the main contributions of UNCTAD.

The UNCTAD report *Closer Multilateral Cooperation on Competition Policy: The Development Dimension*[26] is more explicit concerning the different types of SDT. According to this report, there are four types of special and differential treatment that could be considered.[27] The most reasonable option is to organize technical cooperation between developing and developed countries, in particular capacity-building and exchange of experience in antitrust enforcement. A second option is the establishment of "[t]ransition periods allowing for temporary flexibility and graduality—flexibility with respect to the law's adoption and implementation" complemented by a full array of fundamental competition law elements.[28] A third option is to institute "sectoral exceptions or exemptions covering certain anticompetitive practices under certain specified conditions" and to "give developing countries the right to declare certain sectoral exceptions for developmental reasons," which "would not be subject to a time

[23] UNCTAD, Plan of Action, ¶¶ 139-143, U.N. Doc. TD/386 (Feb. 18, 2000).
[24] Fourth U.N. Conference Resolution, supra note 114, ¶¶ 16-18.
[25] Id. ¶ 19(d).
[26] UNCTAD, Closer Multilateral Cooperation on Competition Policy: The Development Dimension (2002), available at http://r0.unctad.org/en/subsites/cpolicy/gvaJuly/docs/DohaFinal-en.pdf#search=%22Closer%20Multilateral%20Cooperation%20on%20Competition%20Policy%20%20UNCTAD%22.
[27] Id. at 26.
[28] Id.

limit."[29] Finally, a fourth option is to institute "[s]pecific undertakings for developed countries to eliminate their own exceptions and exemptions on a non-reciprocal basis."[30]

It is believed that rules should preserve the capacity of developing countries to pursue development strategies and industrial policy objectives, while at the same time providing them with the technical assistance to meet the obligations assumed under international law.[31] However, the effectiveness of SDT in enhancing development has been recently challenged, and many authors argue that direct payments to developing countries, or the liberalization of sectors in which these countries have a comparative advantage, such as agriculture, would provide a more effective development tool.[32] The adoption of competition law provisions will also impose costs that developing countries are not ready to incur, as they may prefer to spend their scarce resources on other policy priorities.

The main tenet of the paper is that the choice of competition law, which is one of the main components of competition policy, should be largely determined by the institutional development of the country (**Section III**). After showing that the antitrust regime can be largely derived by a combination of decision theory and the theory of regulation and torts built by Glaser and Shleifer, we define the main traits of the competition regime for each level of development. We use survey indicators collected by Kaufman and his team on Governance to build an indicator of institutional development. It combines information about the level of capture of the state, voice

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[29] Id.
[30] Id.
[31] Provisions providing technical assistance and co-operation exist in the context the TRIPS Agreement, supra note 143, art. 67; Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments-Results of the Uruguay Round, 1868 U.N.T.S. 120 (1994); Agreement on the Application of Sanitary and Phytosanitary Measures, art. 9, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IA, Legal Instruments-Results of the Uruguay Round, 1867 U.N.T.S. 493; Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 27(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments-Results for the Uruguay Round, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).
[32] For a discussion and different conclusions, see World Trade Org., The Future of the WTO, Report by the Consultative Board to the Director-General Supachai Panitchpakdi, paras. 88-102 (WTO 2004), available at http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf; Gene M. Grossman & Alan O. Sykes, A Preference for Development: The Law and Economics of GSP, 4 World Trade Rev. 41 (2005); Bernard Hoekman, Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment, 8 J. Int'l Econ. L. 405 (2005); Petros C. Mavroidis, Cosi Fan Tutti [sic]—Tales of Trade and Development, Development and Trade, 47 German Y.B. Int'l L. 39, 39-62 (2005).

and accountability of the state, the rating of the judicial system and control of corruption (**Section IV**).

I. Does the UN Set Create Legal Obligations?: The institutional limitations of promoting global antitrust standards

The Set was adopted by General Assembly resolution 35/63 of 5 December 1980.[33] It has been in operation since and the Fifth Review Conference reaffirmed its validity.[34] However, the majority of commentators consider that the Set has no binding effect.[35] They claim that UNCTAD issued the code, acting as an organ of the General Assembly and that it is common understanding that the actions of the General Assembly itself are not legally binding.[36] However, the validity of the Set has been confirmed by a General Assembly resolution. Consequently, the legal nature of the Set is distinguishable from other codes of conduct adopted by UNCTAD, which were not endorsed by the General Assembly. In other words, because of its adoption by the General Assembly, the Set may demand a higher degree of obligation than other UNCTAD codes. The fact that the General Assembly adopted a resolution on the Set is therefore a relevant issue in examining the nature of the legal obligations that it creates.[37] At the same time, it is highly unlikely that the Set can produce any intrinsic legal effects as a resolution of the General Assembly.[38]

Even in the absence of intrinsic legal effects, it is possible to argue that the continuous reaffirmation of the Set's validity since its adoption in 1980 may lead to the formation of a customary international obligation to prohibit restrictive business practices affecting

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[33] G.A. Res. 35/63, pmbl., U.N. Doc. A/RES/35/63 (Dec. 5, 1980).

[34] The Fifth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, . . . [r]eaffirms the fundamental role of competition law and policy for sound economic development and the validity of the UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.
Fifth U.N. Conference, supra, ¶ 1.

[35] E.g., Richard Schwartz, Are the OECD and UNCTAD Codes Legally Binding?, 11 Int'l Law. 529, 533-34 (1977).

[36] Id.

[37] Nguyen Huu Tru, Les Codes de conduite: Un bilan, in 96 Revue Générale de Droit International Public 45, 47 (1992).

[38] Marko Divac Öberg, The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ, 16 Eur. J. Int'l L. 879, 882-83 (2005). Intrinsic legal effects "exist to the full extent that the explicit and implicit powers of the [General Assembly] allow for them." Id. at 879.

international trade.[39] Indeed, while the initial assessment of the binding effect of the Set, as an act of the General Assembly, may not change over time, this is not the case if we consider the Set as the starting point for the formation of a customary international rule, which is by nature evolving and dynamic. Even if it is always hard to determine the moment when *lex feranda* is transformed into *lex lata* by the mystical process of custom formation,[40] the discovery of this new norm being left to the courts, it is important to examine this possibility regarding the Set by taking into account its broad political and legal context and assessing its extrinsic effects.[41]

A. The Intrinsic Legal Effect of the Set as a General Assembly Resolution

It is important for our analysis first to examine the legal obligations to which a General Assembly resolution can give birth. This question turns on the legislative or normative power of the General Assembly.[42] We will examine the legal force of the Set in regard to the theory of General Assembly resolutions (declarations) as special law-making acts. The question is complex because the Set is not only an act of *interna corporis*, an act taken by the General Assembly concerning the organization of the General Assembly or its rules of procedure,[43] but also a resolution that will have effects on the external sphere of the organization, specifically on the domestic legal order of its member states.[44]

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[39] The Fifth Review Conference, convened at Antalya, Turkey, 14-18 November 2005, adopted a resolution reaffirming the validity of the Set. See Fifth U.N. Conference, supra.

[40] Pierre-Marie Dupuy, L'unité de l'ordre juridique international : Cours général de droit international public (2000), in 297 Recueil des cours: Collected Courses of the Hague Academy of International Law 197 (2003).

[41] Öberg, supra, at 895-96 ("[Legal effects] are extrinsic because, although it is declarations that have legal effects, these are directly based on international customary law. Between the two there is no intermediary instrument providing the adopting body with intrinsic powers.").

[42] For an analysis of the international legal consequences of General Assembly resolutions, see Richard A. Falk, On the Quasi-Legislative Competence of the General Assembly, 60 Am. J. Int'l L. 782 (1966); Gaetano Arangio-Ruiz, The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations, in 137 Recueil des cours: Collected Courses of the Hague Academy of International Law 419, 444-45 (1974).

[43] The resolution adopting the Set is addressed to UNCTAD, an organ created by the General Assembly and subject to its authority; thus, the resolution has a binding effect on UNCTAD. Indeed, under article 22 of the Charter of the United Nations, "[t]he General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions." U.N. Charter art. 22.

[44] The political implications of accepting the legislative function of the General Assembly would be considerable. A broad interpretation is supported by the developing countries, which have a clear majority in the General Assembly. Under this interpretation, the resolutions of the General Assembly might serve as a means to achieve the progressive development of the law towards a greater acceptance of the developing countries' positions, especially concerning the programme for the establishment of a new international economic order (NEIO). In contrast, the developed countries, particularly the United States, refuse to accept any binding effect of the resolutions of the General Assembly. See Mark Ewell Ellis, Comment, The New International Economic Order

Indeed, the Set aims to produce effects outside the organization's legal order by asking member states to "adopt, improve and effectively enforce" antitrust legislation.[45] In regard to the type of acts adopted by international organizations, Philippe Sands and Pierre Klein consider that the interpretative approach must be more restrictive and that "the power to adopt normative acts binding on members in the 'external sphere' must be expressly stated in the organisation's constituent instruments and may not be implied."[46] Therefore, the binding effect of Resolution 35/63 depends on the power given in the U.N. Charter to the General Assembly to adopt binding decisions concerning this particular issue.

The language of the Charter,[47] the *travaux préparatoires* of the San Francisco conference,[48] and the practice of the United Nations and that of its member states lead the majority of authors to conclude that "the *general* powers granted to the Assembly under those Articles do not involve binding decision-making except where it is specially so provided expressly or by implication."[49] The International Court of Justice (ICJ) held in the *South-West Africa* case that "resolutions of the United Nations General Assembly . . . [are] only recommendatory in character and have no binding force."[50] The ICJ has,

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and General Assembly Resolutions: The Debate over the Legal Effects of General Assembly Resolutions Revisited, 15 Cal. W. Int'l L.J. 647, 666 (1985).

[45] Set, supra, art. E(1).

[46] Philippe Sands & Pierre Klein, Bowett's Law of International Institutions 280 (2001).

[47] See Christopher C. Joyner, U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation, 11 Cal. W. Int'l L.J. 445, 452 (1981) ("Within the United Nations system there exists no international law-creating organ, per se. That is, the Charter does not confer upon any organ special powers of legislation comparable to those normally vested in the municipal legislatures of states. Although the General Assembly may draft, approve, and recommend international instruments for multilateral agreement, it cannot through its own volition make them binding upon member states.").

[48] Stephen M. Schwebel, The Effect of Resolutions of the U.N. General Assembly on Customary International Law, 73 ASIL Proc. 301, 301 (1979) ("[A]t the San Francisco Conference on International Organization, only one state voted for a proposal that would have permitted the General Assembly to enact rules of international law that would become binding for the members of the Organization once they had been approved by a majority vote in the Security Council.").

[49] Arangio-Ruiz, supra, at 445. Arangio-Ruiz rejects the theory that the General Assembly's resolutions binding effect is, in abstracto, legitimized by customary rule, id. at 452-60, and the "[d]octrine of Assembly declarations as the expression of the 'Will' of the 'Organised International Community.'" Id. at 460; see also Falk, supra note 42, at 783; Kay Hailbronner & Eckart Klein, Article 10, in 1 The Charter of the United Nations—A Commentary 257, 268-73 (Bruno Simma ed., 2002); Schwartz, supra, at 533-34.

[50] South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Second Phase, 1966 I.C.J. 6, 229-30 (July 18) (Koo, J., dissenting); see also Legal Consequences for the States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 292 (June 21) (FitzMaurice, J., dissenting); Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, Advisory Opinion, 1955 I.C.J. 67, 117 (June 7) (separate opinion of Judge

however, recognized the exceptional binding effect of General Assembly resolutions in areas such as admission of new Member States and voting procedure or apportionment of the budget; yet, without exception, these examples refer to internal matters of the U.N. legal order.[51] It therefore seems highly unlikely that Resolution 35/63 has any intrinsic legal effect.

Nonetheless, the binding effects of resolutions do not derive only from their quality as "special law-making acts" of the General Assembly; rather, they may also derive from their status as rules of international law "within the framework of existing law-making and law-determining processes."[52] Thus, their binding effect is established by their connection to a traditional source of international law, especially international agreements and customary international law.[53]

B. The "Extrinsic Effects" of the Set

The impact of a resolution on the formation of international law could confer a binding character. With regard to the existence of an agreement, it is generally accepted that the conclusion of a treaty requires the express agreement of the states involved to be legally bound. As certain authors observe, however, a vote in favour of a U.N. resolution neither satisfies customary procedural requirements nor necessarily expresses an intent of the states to assume contractual obligations vis-à-vis other states.[54] It is clear that the Set does not constitute an agreement because none of the states that participated in the process agreed, in advance or after the adoption of the Set, to accept the resolution as binding.[55] However, it is generally accepted that General Assembly resolutions can be

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Lauterpacht) ("I have elaborated at what may appear to be excessive length a point which seems non-controversial, namely, that recommendations of the General Assembly are not binding.").

[51] Öberg, supra, at 892-95.

[52] Arangio-Ruiz, Gaetano Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations*, *in* 137 Recueil des cours: Collected Courses of the Hague Academy of International Law 419 (1974), at 469.

[53] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 254-55 (July 8) ("The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinio juris."); Sands & Klein, supra, at 272.

[54] Hailbronner & Klein, supra, at 238.

[55] The resolution does not constitute an agreement per se. More precisely, the legal effect of the resolution is not derived from the recommendation itself, but from the instrument into which the resolution is integrated. See Gaetano Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations*, *in* 137 Recueil des cours: Collected Courses of the Hague Academy of International Law 419, 444-45

used as evidence of customary international law.[56] As such, the Set may constitute material evidence of the emergence of a new customary international rule. One could also argue that even if the Set does not, by itself, constitute evidence of the existence of a customary international rule, it may have contributed to its formation and could be considered as part of the *faisceau d'indices* that is usually considered as evidence of the emergence of a new customary rule.

1. The Set as Evidence of the Existence of a Customary International Rule

It is not the primary aim of this study to consider the theory of international custom.[57] Instead we will focus on the potential contribution of the Set and of Resolution 35/63 in adopting it to the emergence of a customary rule. However, a brief survey of the principles applicable to the formation of customary international law will contribute to a better understanding of the extrinsic legal effects of the Set.

a. The Principles of Customary International Law: A Brief Survey

The theory of customary international law is far more complex and ambiguous than this brief survey will imply.[58] The relationship between international custom and international organizations constitutes perhaps the most complicated issue.[59] According to article 38(b) of the Statute of the International Court of Justice, international custom should be

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(1974), at 486 ("Assembly resolutions do not, per se, integrate agreement . . . it is inappropriate to consider declarations of any of them as an organic species of international agreements.").

[56] Hailbronner & Klein, supra, at 271; see also Nuclear Weapons, 1996 I.C.J. at 254-55.

[57] Custom may be explained as a concerted practice that fulfills both quantitative and qualitative requirements. Indeed, the simple practice of a small number of states does not constitute custom (though perhaps local custom); practice must be universal or enjoin "increasing and widespread acceptance." Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3, 26 (July 25). At the same time, the practice must be long established and the practicing states should be representative.

[58] See generally Anthony A. d'Amato, The Concept of Custom in International Law (1971); Michael Byers, Custom, Power and the Power of Rules (1999); H.W.A. Thirlway, International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law (1972); Karol Wolfke, Custom in Present International Law (1993); Michael Akehurst, Custom as a Source of International Law, 47 British Y.B. Int'l L. 1 (1977); Jack L. Goldsmith & Eric A. Posner, A Theory of Customary International Law, 66 U. Chi. L. Rev. 1113 (1999); Andrew T. Guzman, Saving Customary International Law, 27 Mich. J. Int'l L. 115 (2005); Frederic L. Kirgis, Jr., Custom on a Sliding Scale, 81 Am. J. Intl L. 146 (1987); Anthea Elizabeth Roberts, Traditional and Modern Approaches to Customary International Law: A Reconciliation, 95 Am. J. Intl L. 757 (2001); Brigitte Stern, Custom at the Heart of International Law, 11 Duke J. Comp. & Int'l L. 89 (Michael Byers & Anne Denise trans., 2001); Serge Sur, Sources du droit international: La coutume, in Juris-classeur droit international 1 (1989); John Tasioulas, In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case, 16 Oxford J. Legal Stud. 85 (1996).

[59] See generally Gérard Cahin, La coutume internationale et les organisations internationales: l'incidence de la dimension institutionnelle sur le processus coutumier (2001).

evidenced by "general practice accepted as law."[60] Custom is composed of two elements: an objective or material one, which is state practice, and a psychological one, which is the subjective belief that this practice constitutes law (*opinio juris*).[61] In other words, states will behave a certain way because they are convinced it is binding upon them to do so.[62] The articulation between these two elements has been very controversial; the traditional theory of custom insists on the material element, favouring an inductive approach, whereas the modern theory of custom emphasizes *opinio juris* and uses a deductive approach to recognize the existence of a customary rule.[63] If the "classic view has been that State practice is transformed into customary law by the addition of *opinio juris*[,]

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[60] Statute of the International Court of Justice, art. 38(b), June 26, 1945, 59 Stat. 1031, 1060 [hereinafter Statute of the I.C.J.].

[61] Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 29 (June 3) ("It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States."); North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20).

[62] See North Sea Continental Shelf, 1969 I.C.J. at 44. The psychological element illustrates an anthropomorphist approach and is very difficult to verify because states may declare something and think the opposite. The intention of the states will thus be presumed by the declarations of their official representatives. This element is added as an independent criterion to that of state practice, which also constitutes part of the psychological element. In other words, opinio juris, the psychological element of custom, is composed of two sub-elements: an objective element (state practice) and an intention element (statement of belief). See also Roberts, supra, at 757-58 ("Opinio juris concerns statements of belief rather than actual beliefs."). This is the main complexity of international customary law theory. As is explained by Francesco Parisi, "The traditional formulation of opinio juris is problematic because of its circularity. It is quite difficult to conceptualize that law can be born from a practice which is already believed to be required by law." Francesco Parisi, Customary Law, in 1 The New Palgrave Dictionary of Economics and the Law 572, 573 (Peter Newman ed., 1998); see also Goldsmith & Posner, supra note 58, at 1118. The law and economics school accepts the two elements of customary law (quantitative element (state practice) and qualitative element (opinio juris)) but criticizes opinio juris. The main argument of this school is that rules of customary law emerge out of a "coincidence of interest," rather than a "sense of legal obligation." Goldsmith & Posner, supra, at 1131-33; see also Vincy Fon & Francesco Parisi, Customary Law and Articulation Theories: An Economic Analysis 4 (George Mason Univ. Sch. of Law, Law and Economics Working Papers Series, Paper No. 02-24, 2002), available at http://www.law.gmu.edu/faculty/papers/docs/02-24.pdf. The concept of interest is defined in two ways; there is the "circumstancial interest" which consists of "the immediate costs and benefits of the action" and the "normative interest," which is "the interest that [states] may have in establishing a customary rule, which would bind for the future," Id. at 5. "[C]ustom formation becomes problematic when the circumstantial and normative interests of the parties are not aligned." Id. at 18-19. Different model articulation theories have been proposed in this respect. Id. at 29 ("According to these doctrines, custom emerges when parties formulate like-minded articulations prior to or in conjuction with customary practice.").

[63] Roberts, supra, at 758. The artificial character of this dichotomy has also been criticized by Dupuy, supra, at 165. Some recent studies cast doubt on the necessity of the existence of state practice and propose instead a "rational choice approach" that will look to "compliance and incentives affecting state behaviour," adopting a game theoretical approach of states facing a repeated games prisoner's dilemma. See Guzman, supra, at 122.

[r]ecent trends often reverse the process: following the expression of an *opinio juris*, practice is invoked to confirm *opinio juris*."[64]

This is not, however, the approach adopted by all commentators. The International Law Association (ILA) Committee on Formation of Customary International law considers that the main function of *opinio juris* is "to indicate what *practice* counts (or, more precisely, does not count) towards the formation of a customary rule."[65] State practice, and not *opinio juris*, is therefore believed to be the "most important" component of customary international law.[66] This volontarist approach contrasts with the sociological/objectivist approach, which views the formation of customary rules as the outcome of a social necessity, thus limiting the role of state practice. This difference of opinion in what may appear a technical issue reflects an ideological controversy. Those who favour the importance of state practice "regard State sovereignty and sovereign will as the very roots of international law" and "are more inclined to look for consent . . . in the customary process."[67] On the contrary, authors who follow a deductive approach and consider that *opinio juris* is the most important component of international custom "take a less State-centred standpoint."[68] One should not overstate the importance of the distinction, however, because in reality it is often impossible to distinguish between the two elements.

Commentators take a broad view of what constitutes state practice and include not only physical conduct, but also verbal acts such as "[d]iplomatic statements . . ., policy statements, press releases, official manuals . . . comments by governments on draft treaties, legislation, decisions of national courts and executive authorities, pleadings before international tribunals, statements in international organizations and the resolutions these bodies adopt."[69] For example, the adoption of a resolution by an organ of an inter-governmental organization may be regarded "as a series of verbal acts by the individual

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[64] Theodor Meron, International Law in the Age of Human Rights—General Course on Public International Law, in 301 Recueil des cours: Collected Courses of the Hague Academy of International Law 385 (2004).
[65] Int'l Law Ass'n, Comm. on Formation of Customary (General) Int'l Law, Final Report of the Committee, in The International Law Association: Report of the Sixty-Ninth Conference, London 712, 721 (2000) [hereinafter hereafter ILA Report].
[66] See id. at 724.
[67] Id. at 713-14.
[68] Id. at 714.
[69] Id. at 725.

Member States participating in that organ,"[70] and thus may constitute state practice.[71] In order to qualify as state practice, this pattern of conduct should have accumulated in "sufficient *density*, in terms of uniformity, extent and representativeness."[72] However, it is enough that there is "sufficient uniformity for the *main principles* . . . even if that was not necessarily so . . . for detailed rules."[73] While the customary rule is in the process of emerging, it is still possible for a state that persistently objects not to be bound, even when the customary rule is eventually crystallized.[74]

The quest for the existence of *opinio juris* is not a mere exercise in legal abstraction. Usually, the court will exclude *opinio juris*, the subjective element of international custom, by examining patterns of conduct that could be considered in an objective analysis. The fact that there is strong evidence of *opinio juris* does not exempt the court from examining patterns of conduct, but may invert the process, causing the court to examine first *opinio juris* and then state practice.

In the *North Sea Continental Shelf* case, the ICJ first examined practice and then *opinio juris*.[75] This is the normal interpretation of article 38 of the ICJ's statute, which defines international custom as "general practice accepted as law."[76] The court found that, in order for practice to reflect the existence of *opinio juris*, two conditions must be fulfilled:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are

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[70] Id. at 730.
[71] Contra Öberg, supra, at 22 (arguing that General Assembly resolutions do not constitute state practice if they are considered evidence of opinio juris).
[72] ILA Report, supra, at 731. The ICJ decided in the Asylum case that a customary rule must be "in accordance with a constant and uniform usage practised by the States in question." Asylum (Colom. v. Peru), 1950 I.C.J. 266, 276 (Nov. 20).
[73] ILA Report, supra, at 734 (citing Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 33 (June 3)).
[74] Id. at 751; see also Jonathan I. Charney, The Persistent Objector Rule and the Development of Customary International Law, 56 British Y.B. Int'l L. 1 (1986).
[75] North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20).
[76] Statute of the I.C.J., supra note 60, art. 38.

conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough.[77]

In *Nicaragua v. United States*, the position of the court shifted towards an inversion of the process.[78] Contrary to the *North Sea Continental Shelf* case, where the court adopted an inductive approach and examined whether practice was accepted as law before moving to the subjective element of custom, in *Nicaragua v. United States*, the ICJ established the subjective element, *opinio juris*, concerning the principle of non-interventionism. It is in the light of this subjective element that the court considered later the relevant practice.[79]

In the analysis of *opinio juris*, the court may also take into account conduct that has not necessarily been qualified as state practice in the first step of the analysis. This creates the false impression that the court sometimes ignores the objective element of custom and focuses on the subjective. In reality, the objective element is always present in a more or less pronounced form because *opinio juris* is always incorporated in patterns of conduct. However, these patterns of conduct may not always fulfil the criteria of the first step of the analysis (uniformity, extent, and representativeness) in order to qualify as state practice. Thus, in *Nicaragua v. United States*, the court seemed to have deduced *opinio juris* by examining the General Assembly resolutions that reaffirmed the principle of non-intervention contained in the U.N. Charter[80] as well as the attitude of the states towards these General Assembly resolutions.[81] At the same time, the Court demanded very little evidence of uniform, extensive, and representative state practice.[82] Consequently, the General Assembly resolutions may contribute to the process of creating customary law by providing evidence of both state practice[83] and *opinio juris*.[84]

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[77] North Sea Continental Shelf, 1969 I.C.J. at 44.
[78] Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 98 (June 27).
[79] Id. at 98 ("It is . . . in the light of this 'subjective element' . . . that the Court has to appraise the relevant practice.").
[80] See id. at 196.
[81] See id. at 99-100 ("This opinio juris may, though with all due caution, be deduced from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions . . . .").
[82] See id. at 98 ("The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule.").
[83] ILA Report, supra, at 772 ("[F]or States without the material means for concrete activity in the field in question . . . verbal acts [such as GA resolutions] may be the only form of practice open to them.").
[84] In Nicaragua v. United States, the court considered that General Assembly's resolutions may "reflect" the existence of opinio juris. Miliary and Paramilitery Activities, 1986 I.C.J. at 103; see

However, a General Assembly resolution, even if it has been unanimously adopted, is not conclusive evidence of the emergence of a new customary rule. It is also important to prove that there was "a clear intention on the part of their supporters to lay down a rule of international law."[85] Resolutions should manifest the existence of a wide international consensus on a particular issue, according to specific criteria. According to some authors, these criteria, which integrate the two elements of customary law, are: "(1) a requisite degree of consensus in support of the resolution, (2) language which adequately indicates and describes the resolution's legal nature, (3) sufficient expectations that the resolution is legally binding, and (4) a requisite degree of implementation and reliance upon the resolution."[86] To the extent that the criteria are fulfilled, the resolution can provide conclusive evidence of the existence of a customary norm.

Therefore, it appears that there can be no definitive conclusion regarding the extrinsic legal effect of General Assembly resolutions because it depends on the particular characteristics of each resolution.[87] The resolution itself, or, rather, its intrinsic characteristics, such as language, the conditions of its vote, and the *état d'esprit* of its authors, do not constitute the only elements that are considered. Some extrinsic elements (implementation and reliance upon the resolution), which are subsequent to the adoption of the resolution and which refer to the attitude of states and their responsiveness to the resolutions, also should be taken into account.[88] Without these extrinsic elements, the

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also Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 254-55 (July 8):

> General Assembly resolutions, even if they are not binding [(of themselves)—intrinsic effect], may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinio juris. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an opinio juris exists as to its normative character. Or a series of resolutions may show the gradual evolution of the opinio juris required for the establishment of a new rule.

Note, however, the dissenting opinion of Judge Schwebel. "[I]n its Opinion, the Court concludes that the succession of resolutions of the General Assembly on nuclear weapons 'still fall short of establishing the existence of an opinio juris on the illegality of the use of such weapons,' In my view, they do not begin to do so." Id. at 318 (Schwebel, J., dissenting).

[85] ILA Report, supra, at 772.

[86] Ellis, supra, at 692-93.

[87] According to arbitrator René-Jean Dupuy, "the[ir] legal value is variable." Texaco Overseas Petroleum Co. v. Libyan Arab Republic, 17 I.L.M. 1, 29 (Int'l Arb. Trib. 1978).

[88] Öberg, supra, at 895-903.

resolution can at best be considered as a *commencement de la preuve* and not as sufficient evidence of the existence of customary law.[89]

b. Analysis of the UNCTAD Set

As a starting point, it should be mentioned that the Set did not recognize or consolidate pre-existing norms, "nor did its adoption 'crystallize' any nascent customary rules."[90] Studies undertaken before the adoption of the Set prove that there was no consensus regarding the existence of international competition standards, despite continuing efforts at negotiation.[91] However, as has been recognized by some commentators, "it remains to be determined whether the formulation and incorporation into the Set of any competition norms, and their adoption, may have generated norms *de lege ferendae*, and whether an *opinio juris* has by now emerged transforming the content of such norms into binding customary rules—or whether there are signs that such a process may happen in the future."[92] The Set could constitute a material source of a new customary rule.

The fact that the Set was adopted only thirty years ago, in 1980, is not a determinative factor. The ICJ held in the *North Sea Continental Shelf* cases that this "is not necessarily, or of itself, a bar to the formation of a new rule of customary international law" as long as "within the period in question, short though it might be, State practice . . . should have been both extensive and virtually uniform in the sense of the provision invoked."[93] The permanent and continuous contacts between states in the modern era may explain the formation of customary rules even after a relatively short period of time.[94]

This analysis of the existence of a customary rule will focus on two sources: the Set and General Assembly Resolution 35/63, which adopted the Set. The resolution was passed unanimously and "without recorded objections,"[95] which strengthens the case for binding

[89] An a contrario interpretation of Judge Schwebel's opinion in the Nuclear Weapons Advisory Opinion supports this interpretation. 1996 I.C.J. at 318.
[90] Dhanjee, supra, at 86.
[91] See Foscaneanu, supra; Furnish, supra.
[92] Dhanjee, supra, at 86.
[93] North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, at 43 (Feb. 20).
[94] Dupuy, supra note 40, at 167. See, however, the more reserved opinion of Meron, supra, at 389, for whom even if "[o]bviously the time required for the maturation of custom has been shortened . . . changes in the time factor have been less drastic than often suggested."
[95] Oesterle, supra, at 55.

effect.[96] It affirmed without ambiguity that it "[*a*]*dopts* the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, approved by the United Nations Conference on Restrictive Business Practices."[97] The language used by the resolution, along with its unanimous passage, establish that the General Assembly fully validated the Set. Indeed, the resolution does not refer to anything other than the Set.[98] However, the text of the resolution does not contain any information as to the legal status of the Set.

The silence of the General Assembly on this point can be explained in two ways: either it is the expression of the General Assembly's intention not to give the Set any legal value, or the General Assembly thought it superfluous to do so, believing the simple reference to the rules in the Set was sufficient to confer legal effect. Furthermore, according to General Assembly Resolution 33/153, UNCRBP had to take "all decisions necessary for the adoption of, a set . . . including a decision on the *legal* character of the principles and rules."[99] It may be argued that the resolution delegated the task of determining the legal nature of the future Set to the UNCRBP, which, after the adoption of the Set, transmitted it to the General Assembly "having taken all decisions necessary for its adoption as a resolution." The silence of General Assembly Resolution 35/63 could be explained as an implicit acceptance that the legal value of the Set is that of a General Assembly resolution. In adopting the Set, the General Assembly may have considered that its decisions could have legal effect.[100] Even if, as we have previously affirmed, the theory of the legislative function of the General Assembly is not valid, resolutions of the General Assembly can at least be considered as evidence of the fact that there was an *expectation* that the resolution could be legally binding and contribute to the establishment of an *opinio juris*. It follows that if, during the negotiation of the Set, there was no agreement among developing and

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[96] See Texaco Overseas Petroleum Co. v. Libyan Arab Republic, 17 I.L.M. 7, at 30 (Int'l Arb. Trib. 1978) ("The consensus by a majority of States belonging to the various representative groups indicated without the slightest doubt universal recognition of the rules therein incorporated.").

[97] G.A. Res. 35/63, supra note 33, ¶ 1.

[98] Except the preamble of Resolution 35/63, which recalls Resolutions 3201 and 3202 concerning the establishment of NIEO; Resolution 3281, containing the Charter of Economic Rights and Duties of States; and Resolution 3362 on development and international economic co-operation. The later text suggests, as explained by Oesterle, supra note **Error! Bookmark not defined.**, at 55, that "the arguments of Group of 77 countries for discriminatory treatment of their indigenous industries, in accord with New International Economic Order principles, will reappear in arguments on the meaning of language in the agreement."

[99] G.A. Res. 33/153, ¶ 2, U.N. Doc. A/RES/33/153 (Dec. 20, 1978) (emphasis added).

[100] The process has similarities with that used in several national legal systems, where the parliament, exercising its legislative function, delegates to another authority or commission of experts the establishment of detailed norms.

developed countries concerning its legal value, as is attested by the use of the term "should" and not "shall" originally proposed by the developing countries in the operative provisions of the Set,[101] the unanimous vote in favour of resolution 35/63 is evidence of a consensus on the general principles adopted by the code with the view that these principles, in particular, must have some legal effect.

The ILA's report notes that in the *Continental Shelf (Libya/Malta)* case, the ICJ considered that "there was sufficient uniformity for the *main principles* to have become part of international law, even if that was not necessarily so (at least at that time) for detailed rules about, say, the allocation of surplus stocks."[102] The more positive language used at parts A (objectives) and B (definition and scope of application) of the Set seems to confirm this interpretation and the possibility of the main principles of the Set. This language was chosen "to ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization" of trade or "to attain greater efficiency in international trade and development" by "[t]he creation, encouragement and protection of competition" being transformed into international customary rules.[103]

One could nevertheless object to the conclusion that General Assembly Resolution 33/153 could not delegate the decision on the binding effect of the Set to the UNCRBP, as it did not have the authority to determine the legal status of the Set in the first place. Consequently, it could not delegate that authority. In addition, developed nations generally do not accept the theory of the binding effect of General Assembly resolutions,

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[101] Indeed, parts C, D, E, and F of the Set expressing states' and multinational firms' responsibility in applying the principles of the Set use systematically nonbinding terminology. E.g., Set, supra, art. C(1) ("Appropriate action should be taken in a mutually reinforcing manner at national, regional and international levels to eliminate, or effectively deal with, restrictive business practices . . . adversely affecting international trade" (emphasis added)); id. art. D(1) ("Enterprises should conform to the restrictive business practices laws, and the provisions concerning restrictive business practices in other laws, of the countries in which they operate." (emphasis added)); see also Benson, supra, at 1034-36 (citing further examples concerning the absence of a legal value of the Set).

[102] ILA Report, supra, at 734.

[103] Set, supra, art. A(1), (2). See in particular the terms used in part B(ii) of the Set: "The Set of Principles and Rules applies to restrictive business practices," id. Art. B(4) (emphasis added); "The provisions of the Set of Principles and Rules shall be universally applicable to all countries and enterprises regardless of the parties involved in the transactions, acts or behaviour," id. Art. B(7) (emphasis added); "The Set of Principles and Rules shall not apply to intergovernmental agreements, nor to restrictive business practices directly caused by such agreements," id. art. B(9) (emphasis added).

and even if they vote to approve such a resolution, they do not always "really mean it."[104] It is, therefore, important to examine state practice, in order to verify the "requisite degree of implementation and reliance upon the resolution."[105] Put differently, "what states *do* is more important than what they say."[106]

A key element in determining the legal effect of the Set in the emergence of *opinio juris* is the views expressed during the five yearly conferences held to review its implementation and the adoption of other resolutions reaffirming its principles.[107] The continuous adoption of resolutions and international declarations pertaining to a specific principle—e.g., those that prohibit the restrictive business practices that affect trade and, in particular, developing countries—reinforces such principles and demonstrates the existence of a commitment among the community of states.

The First Review Conference in 1985 reflected the disagreements between the developing and developed countries concerning the legal effect of the Set.[108] Developing countries considered that the Set had not attained its primary objective and that it had to become binding in the long run, whereas developed countries insisted on its informal character, focusing on the need to enhance international cooperation and technical assistance for developing countries.[109] The conference did not succeed in adopting any resolution.[110] A consensus between developed and developing countries was reached in the Second Review Conference in 1990. The delegates adopted an approach that was "mostly in line

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[104] Schwebel, supra, at 302 ("[T]he members of the General Assembly typically vote in response to political not legal considerations. They do not conceive of themselves as creating or changing international law . . . . The issue often is one of image rather than international law . . . . Thus General Assembly resolutions are neither legislative nor sufficient to create custom, not only because the General Assemly is not authorized to legislate but also because its members . . . don't 'mean it.' That is to say, in fact, states often don't meaningfully support what a resolution says and they almost always do not mean that the resolution is law."). This theory implies that "statement of belief" cannot be considered as evidence of opinio juris, contrary to what we assumed previously, but it is what the states do that counts. See also Goldsmith & Posner, supra note 58, at 1115-16 ("[C]ase studies demonstrate that courts and commentators rely too heavily on what nations say at the expense of what they do and why, and they tend to limit CIL [customary international law] to behavioral regularities that are 'good' from their normative perspective, denigrating regularities that are bad as 'comity' or a violation of, or an exception to, the CIL rule." (emphasis added)).

[105] Ellis, supra, at 693.

[106] Schwebel, supra, at 302.

[107] Dhanjee, supra, at 95. Since the adoption of the Set in 1980, UNCTAD has held a conference to review the Set every five years, in 1985, 1990, 1995, 2000, and 2005.

[108] Id.

[109] Id.

[110] Id.

with" the developed countries' views that the Set should be implemented by the developing countries at the national level, while at the same time putting in place a detailed framework for technical assistance to these countries under UNCTAD.[111] The Third Review Conference emphasized inter-national aspects of competition policy by requiring the intergovernmental group of experts to examine the existence of common ground.[112] It also acknowledged that difficulties in the identification of common ground usually reflect "differences among economic theories, or among competition laws or policies."[113] Thus, a consensus may exist on the importance of competition law norms worldwide, but not on their content.

The Fourth Review Conference, in 2000, moved a step further when it adopted a resolution that reaffirmed the validity of the Set and recommended that the General Assembly "subtitle the Set for reference as 'UN Set of Principles and Rules on Competition.'"[114] The objective of this change of terminology was to strengthen the visibility of the United Nations system in international antitrust. The General Assembly refused, without a vote, to endorse the recommendation of the Fourth Review Conference regarding the subtitling of the Set.[115] It nevertheless stressed the role of competition law and policy for international trade and decided to convene the Fifth Review Conference under the auspices of UNCTAD in 2005.[116] Resolution 55/182 was followed by the São Paolo Consensus, adopted by UNCTAD in June 2004, which reaffirmed UNCTAD's role in ensuring "that anti-competitive practices do not impede or negate the realization of the benefits that should arise from liberalization in globalized markets, in particular for developing countries and LDCs [least developed countries]."[117]

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[111] Id. at 96.
[112] Third United Nations Conference To Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Geneva, Switz., Nov. 13-21, 1995, Resolution, ¶ 11, U.N. Doc. TD/RBP/CONF.4/14 (Nov. 28, 1995).
[113] Id. ¶ 11(b).
[114] Fourth United Nations Conference To Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Geneva, Switz., Sept. 25-29, 2000, Resolution, ¶ 1, U.N. Doc. TD/RBP/CONF.5/15 (Oct. 4, 2000) [hereinafter Fourth U.N. Conference Resolution].
[115] G.A. Res. 55/182, U.N. Doc. A/RES/55/182 (Jan. 18, 2001).
[116] Id. ¶ 27.
[117] U.N. Conference on Trade & Dev. [UNCTAD], 11th Sess., São Paulo, Braz., June 13-18, 2004, São Paulo Consensus, ¶ 95, U.N. Doc. TD/410 (June 25, 2004).

In 2005, the General Assembly adopted Resolution 59/221 on trade and development, following the proposal of the government of Qatar on behalf of the Group of 77 Member States (developing countries) and China, which explicitly stressed

> the importance of strengthening and enabling the . . . efforts to prevent and dismantle anti-competitive practices and promote responsibility and accountability of corporate actors at both the international and the national levels, thereby enabling developing countries' producers, enterprises and consumers to take advantage of trade liberalization, and encourages developing countries to consider establishing competition laws and frameworks best suited to their development needs, complemented by technical and financial assistance for capacity-building, taking fully into account national policy objectives and capacity constraints.[118]

The resolution was adopted by a vote of 166 in favour to 2 against (one of them being the United States), with 6 abstentions (Australia, Canada, Israel, Japan, New Zealand, and the Republic of Korea).[119] The countries that voted in favour were both developing and developed countries, such as the European Union Member States.[120]

Continuing the process of periodical review of the Set, the Fifth Review Conference took place in November 2005. The conference unanimously adopted a resolution that reviewed all aspects of the Set, recognised the fundamental "role of competition law and policy for sound economic development," and reaffirmed the validity of the Set, calling upon all member states to make every effort to fully implement its provisions.[121] The resolution noted "the continuing adoption, application or reform of national competition laws and policies and the increase in relevant bilateral and regional agreements and in international cooperation in this area" and recognised "the positive contribution made by the Set and by UNCTAD to the promotion of competition policy."[122]

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[118] G.A. Res. 59/221, ¶ 30, U.N. Doc. A/RES/59/221 (Feb. 11, 2005). Paragraph 30 was not included in the draft resolution, which simply endorsed the work of the UNCTAD in different areas of international trade and more specifically competition policy, but was added later.
[119] General Assembly, Reports of the Second Committee, U.N. GAOR, 59th Sess., 75th plen. mtg. at 6, U.N. Doc. A/59/PV.75 (Dec. 22, 2004).
[120] Id.
[121] Fifth United Nations Conference To Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Antolya, Turk., Nov. 14-18, 2005, Report, pmbl., ¶ 1, U.N. Doc. TD/RBP/CONF.6/14 (Nov. 23, 2005).
[122] Id. pmbl.

The continual process of reviewing and reaffirming the validity of the Set, with the participation of countries belonging to various representative groups may constitute state practice and evidence of customary law. However, the fact that there is a state practice compatible with the principles of the Set does not necessarily mean that this state practice implemented the principles of the Set or that the states considered these principles legally binding.[123] In fact, many states do not consider that they are bound by the Set for the simple reason that most of its provisions are highly imprecise. The absence of a binding mechanism for implementation or enforcement[124] might be used as an argument against the recognition of the legal effects of the Set.[125]

Yet, the absence of a binding mechanism does not mean that states are free to ignore the Set[126] or that it does not constitute a legal rule.[127] When international law does not provide for centralised enforcement by an international court or institution, its enforcement must be based on a decentralised system. Nonetheless, in order to be obeyed, in the absence of a specific enforcement mechanism, international norms must have a certain degree of legitimacy.[128]

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[123] There is no evidence in the process of review of the principles of the Set that developed countries considered themselves bound by the Set. The "unprecedented level of consensus" in the recognition of the importance of competition policy, at the international and national level, which was observed in the Fourth Review Conference is not an element that can be considered in favour of a legal binding effect of the Set, but is mainly explained by the worldwide recognition of the importance of competition policy and may constitute evidence of a nascent or existing opinio juris on the need to prohibit restrictive business practices that affect trade.

[124] Set, supra, art. G(4) ("[I]n the performance of its functions, neither the Intergovernmental Group nor its subsidiary organs shall act like a tribunal or otherwise pass judgement on the activities or conduct of individual Governments or of individual enterprises in connection with a specific business transaction. The Intergovernmental Group or its subsidiary organs should avoid becoming involved when enterprises to a specific business transaction are in dispute.").

[125] Benson, supra, at 1034.

[126] See Benedict Kingsbury, The Concept of Compliance as a Function of Competing Conceptions of International Law, 19 Mich. J. Int'l L. 345, 368 (1998) (describing compliance as an "elusive concept"). This author challenges the traditional conception of compliance as a "correspondence of behavior with legal rules." Id. at 346. He considers that "the assumption that conformity and non-conformity are binary is not an adequate reflection of international practice, in which degrees of conformity or non-conformity and the circumstances of particular behavior often seem more important to the participants." Id. at 348.

[127] See Anthony A. D'Amato, Is International Law Really "Law"?, 79 Nw. U. L. Rev. 1293, 1314 (1985) ("Occasionally people or states will break laws despite the presence of enforcement machinery, but that does not mean that there were no laws to begin with.").

[128] See generally Thomas M. Franck, The Power of Legitimacy Among Nations (1990). The importance of legitimacy in explaining the compliance of states to international law highlights the internal aspect of a legal rule, which we can generally explain as "the sense" of the existence of a legal obligation, a product of "reflective critical attitude." See H.L.A. Hart, The Concept of Law 56-57, 88-117 (2d ed. 1994). Other theories than legitimacy have been proposed in order to explain the compliance of states to international law. See Harold Hongju Koh, Why Do Nations Obey International Law, 106 Yale L.J. 2599, 2603 (1997). Law and Economics based

Thomas M. Franck defined legitimacy as "a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process."[129] For this author, four indicators of rule-legitimacy exist: "determinacy, symbolic validation, coherence, and adherence; . . . to the extent a rule, or rule process, exhibits these four properties it will exert a strong pull on states to comply."[130] Concerning determinacy, according to this author, "the more determinate a standard, the more difficult it is to justify non-compliance."[131] Determinacy has two aspects: it can be defined as "more or less synonymous with clarity"[132] (textual determinacy) but it is also accepted that "[a] rule with low textual determinacy may overcome that deficit if it is open to a process of clarification by an authority recognized as legitimate by those to whom the rule is addressed"[133] (procedural or institutional determinacy). This theory is appealing because it also takes into account the cases where the rule is expressed in the form of a standard,[134] what the author calls "sophist rules."[135] These rules may create a paradox,

> a sophist rule of complex, elastic texture, employing a subjective, qualitative standard to measure compliance and configured by exculpatory *why* and *to whom* considerations, while superficially appearing to have less legitimacy than an idiot rule because it has less textual clarity and certainty, might better predict and influence actual state behavior precisely because it makes more sense or seems more just. It will thus exert a stronger compliance pull.[136]

Nevertheless, the author stresses that there must be "a process for the rule's case-by-case application which, itself, is widely accepted as legitimate," otherwise "[s]ophist rules

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international law theories generally explain compliance as a function of national self-interest. See Goldsmith & Posner, supra note 58, at 1115 ("States do not comply with CIL [Customary International Law] because of a sense of moral or legal obligation; rather, CIL emerges from the states' pursuit of self-interested policies on the international stage.").

[129] Franck, supra note 128, at 24.

[130] Id. at 49.

[131] Id. at 54.

[132] Id. at 52.

[133] Id. at 61, 80 ("[L]ack of textual determinancy may be redressed by process determinancy.").

[134] On the distinction between rules and standards, see: Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557 (1993); Pierre Schlag, Rules and Standards, 33 UCLA L. Rev. 379 (1985); Kathleen M. Sullivan, Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22 (1993); and Cass R. Sunstein, Problems with Rules, 83 Cal. L. Rev. 953 (1995).

[135] Franck, supra, at 85.

[136] Id.

lacking this interpretative component tend to be seen as mere hunting licenses for states to do whatever they wish."[137] This process does not have to assure compliance, but only preserve a coherent interpretation of the meaning of the rule, according to certain principles.[138]

A close examination of the Set demonstrates that these criteria are not fulfilled. The Set does not provide for a bright-line rule, for example, a per se prohibition of certain restrictive practices. It institutes instead a rule-of-reason approach, reflected by the use of the word "unduly" in defining the restriction of competition and employs the highly indeterminate term of "market access."[139] As explained in the first part of this study, the exact scope of these concepts cannot be determined easily as it depends on the intensity of their effects. For example, it is widely accepted that export cartels affect market access. However, it seems difficult to determine, *in abstracto*, if a practice will have the effect of restricting market access unduly, which supposes that states can justify this restriction by a legitimate public purpose.[140] In conclusion, the Set establishes a standard, or a sophist type rule. However, in order to produce some legal effects, and not be a mere hunting license, the standard should also have an interpretative component. The Set does not institute an interpretative mechanism, which could also be an enforcement mechanism.[141] Article G(4) provides:

> In the performance of its functions, neither the Intergovernmental Group nor its subsidiary organs shall act like a tribunal or otherwise pass judgment on the activities or conduct of individual Governments or of individual enterprises in connection with a specific business transaction. The Intergovernmental Group or its subsidiary organs

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[137] Id.

[138] Id. at 163. The concept of "coherence" is distinguished by the author from that of "consistency." While "a rule's inconsistent application does not necessarily undermine its legitimacy as long as inconsistencies can be explained to the satisfaction of the community by a justifiable distinction," the same cannot be said for incoherence. Thus, sophist rules face the problem of incoherence, "which emerges if the principles underlying it fail to connect rationally with other rules, or with parts of the same rule." Id.

[139] The choice of a rule of reason approach is not explained by any economic rationale. Instead, it reflects the disagreement and the absence of consensus concerning the legal effect of the Set. It is therefore an element negating the existence of an opinio juris concerning the binding effect of the Set and of the subsequent resolution.

[140] The Set does not define categories of business practices that can have an adverse effect on competition or can restrict market access. The list of business practices contained in articles D(3) and D(4) are examples of potential restrictive practices, but this restrictive effect must always be determined in light of the analysis of the conditions fixed by the chapeau of articles D(3) and D(4). Set, supra, art. D(3)-(4).

[141] The in concreto analysis needed in order to interpret and determine the content of a standard is provided by the existence of an enforcement mechanism.

should avoid becoming involved when enterprises to a specific business transaction are in dispute.[142]

In addition, none of the review conferences attempted to clarify the substantive principles of the Set.

For these reasons, the Set does not appear to have any legal binding effect and does not, by itself, constitute conclusive evidence of the existence of a customary international rule on restrictive business practices. Even so, the Set may still contribute to the formation of a customary international rule and prove, along with some other patterns of conduct, the emergence of *opinio juris* and the existence of state practice.

2. The Set Contributes to the Formation of a Customary International Rule

It is submitted that, although it seems unlikely that the Set constitutes in itself conclusive evidence of *opinio juris*, if considered in the context of other international initiatives in this area, it may contribute to the formation of a customary international rule.

Indeed, an important number of international treaties concluded during the last decades include provisions on competition law. The numerous antitrust cooperation agreements and antitrust mutual assistance agreements that were signed during this period reflect the intention of the drafting states to avoid positive or negative conflicts of jurisdiction resulting from the extraterritorial application of antitrust laws or to improve the effective enforcement of domestic competition law in an increasingly global marketplace. These agreements may provide evidence of state practice recognizing the importance of tackling restrictive business practices that affect trade. It is not the objective of this study to examine in detail these different international initiatives in competition law. Nevertheless, a brief survey of the different international initiatives will provide useful information regarding the possible emergence of *opinio juris*.

One could mention the existence of provisions related to competition law in international agreements of quasi-universal application, such as the WTO.[143] Although these

[142] Set, supra, art. G(4).

[143] General Agreement on Trade in Services, arts. VIII-IX, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 (1994); see also Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 40, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299

provisions fall short of establishing an international competition law regime, some authors advance that "with marginal additional interpretation of GATT rules, cartels can already be addressed in the existing WTO framework *if* the national enforcement capacity exists."[144]

In addition, some WTO Member States committed to follow the Reference Paper on Telecommunications Services (the Paper), which requires members to take appropriate measures in order to prevent anti-competitive practices by major suppliers.[145] In particular, the Paper prohibits signatories from engaging in anti-competitive cross-subsidization, using information obtained from competitors with anti-competitive results, and failing to make necessary technical information about essential facilities and commercially relevant information available to other service suppliers on a timely basis.[146] The Paper also provides that interconnection with major suppliers must be ensured on a non-discriminatory basis and "in a timely fashion, on terms, conditions . . . and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided."[147]

The provisions of the Paper gave rise to recent litigation initiated by the United States against Mexico in the *Mexico-Measures Affecting Telecommunications Services* case (*Telmex* case). The case concerned the failure of Telmex, a former monopoly and the major supplier of basic telecommunications services in Mexico, to refrain from engaging in anti-competitive practices.[148] The United States claimed that Mexico was in breach of section 1.1 of the Paper because it allowed Telmex to operate a cartel, fix rates for international interconnection, and restrict the supply of basic telecommunications services,

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[hereinafter TRIPS Agreement]. For a detailed analysis, see Kevin C. Kennedy, Competition Law and the World Trade Organisation: The Limits of Multilateralism (2001); Philip Marsden, A Competition Policy for the WTO (2003); Roland Weinrauch, Competition Law in the WTO (2004).

[144] Bernard Hoekman & Petros C. Mavroidis, Economic Development, Competition Policy, and the World Trade Organization 16 (World Bank, Policy Research Working Paper No. 2917, 2002).

[145] World Trade Org., Reference Paper on Telecommunications, Negotiating Group on Basic Telecommunications 1.1 (Apr. 24, 1996), http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm (last visited Feb. 7, 2007).

[146] Id. at. 1.2.

[147] Id. at. 2.2(a)-(b).

[148] Panel Report, Mexico-Measures Affecting Telecommunications Services, ¶ 3.1, WT/DS204/R (Apr. 2, 2004) [hereinafter Telmex]; see Eleanor M. Fox, The WTO's First Antitrust Case—Mexican Telecom: A Sleeping Victory for Trade and Competition, 9 J. Int'l Econ. L. 271 (2006); Damien J. Neven & Petros C. Mavroidis, El Mess in TELMEX: A Comment on Mexico—Measures Affecting Telecommunications Services, 5 World Trade Rev. 271 (2006).

which raised the costs of the termination of calls in Mexico by U.S. carriers. The practice mainly affected American consumers. Its aim was to prevent a price war between Mexican carriers concerning the interconnection rates charged to American firms for incoming calls, as this would "drive the rates of all carriers too low to support infrastructure build-out," which was a high priority for Mexico.[149] Mexico contended that article 1.2 of the Paper did not include cartels. Rather, the Mexican Government maintained that the Paper referred to types of anti-competitive practices other than the business practices at issue, which were imposed by the Federal Commission of Telecommunications (COFETEL). Mexico argued that these practices constituted state action, which could not fall within the scope of competition law.[150]

The WTO panel in *Telmex* gave a broad definition to the term "anti-competitive practices," suggesting that this expression covers all "actions that lessen rivalry or competition in the market," in addition to the restrictive business practices that were listed in article 1.2.[151] In examining the meaning of anti-competitive practices, the panel referred to its use in member states' own competition legislation and to related provisions of some international instruments that address competition policy, such as the Havana Charter, the Set, the Organisation for Economic Co-operation and Development (OECD), and the WTO Working Group on the Interaction between Trade and Competition Policy.[152] It finally concluded that "[i]nternational commitments made under the GATS 'for the purpose of preventing suppliers . . . from engaging in or continuing anti-competitive practices' are . . . designed to limit the regulatory powers of WTO Members."[153] The panel reached this conclusion despite the fact that Mexico had a competition law in place; the panel considered that Mexico had not taken appropriate measures to prevent the anti-competitive practices. This is a remarkable case as it is the first time that, in the WTO context, competition policy concerns trumped the strict wording of a trade agreement such as the Paper.[154]

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[149] Telmex, supra note 188, ¶¶ 3.1(b), 4.161.
[150] Id. ¶¶ 4.290-.292.
[151] Id. ¶ 7.230-.231.
[152] Id. ¶ 7.235-.236.
[153] Id. ¶ 7.244.
[154] In the Kodak/Fuji film case, the WTO Panel adopted a more cautious approach in extending the scope of the GATT rules to this type of public/private restraints. See Panel Report, Japan—Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R (Mar. 31, 1998). See also the critical comments of Neven & Mavroidis, supra note 148, at 291 ("[T]he fundamental,

The fact that no agreement has been reached in starting multilateral negotiations on competition law under the WTO agreement should not be considered as an element raising doubts on the possible emergence of *opinio juris* concerning the need to address internationally restrictive business practices that affect trade and development. As was explained by the chairman of the working group on competition and trade, "none of the opponents objected to the principal goal of the EU (i.e. to contribute to the fight against transnational anticompetitive cartels which restrict trade)" but "they objected to the specific proposal of the EU because they considered that as it applied to them the cost of this proposal would outweigh its benefits."[155]

It is also noteworthy that "nearly all bilateral or regional trade agreements negotiated in the recent past . . . or which are in the process of being negotiated . . . include a competition chapter or competition provisions." [156] These agreements have been concluded by states representing different degrees of development and from different regions of the world,[157] thus reflecting "the understanding on the part of the trade community that trade liberalization will deliver its expected benefits only if some form of market governance ensures that anticompetitive practices do not defeat the purpose of negotiated trade concessions."[158]

It is accordingly possible to argue that, in view of these international agreements, the Set may contribute to the emergence of an international customary rule prohibiting restrictive business practices. This eventuality has already been examined by arbitrators and the courts, but without reaching this conclusion. For example, in the case of *United Parcel Service of America, Inc. v. Canada*, which was brought under Chapter 11 of the North American Free Trade Agreement (NAFTA agreement), the arbitration tribunal refused to consider that there was a customary international law obligation to prohibit or regulate

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quintessential obligation of all WTO adjudicating bodies is not to undo the balance of rights and obligations as struck by the negotiating partners.").

[155] Jenny, Competition, Trade, supra, at 647.

[156] Id. at 654.

[157] For an extensive analysis of the competition-related provisions in regional trading agreements, see Oliver Solano & Andreas Sennekamp, Competition Provisions in Regional Trade Agreements (Org. for Econ. Co-operation and Dev., Trade Policy Working Paper No. 31, 2006); see also U.N. Conference on Trade & Dev., Competition Provisions in Regional Trade Agreements: How To Assure Development Gains (Philippe Brusick et al. eds., 2005), available at http://www.unctad.org/en/docs/ditcclp20051_en.pdf.

[158] Jenny, Competition, Trade, supra, at 654.

anti-competitive practices.[159] In that case, UPS claimed that the state-owned Canada Post Corporation had engaged in anti-competitive practices, such as leveraging, predatory practices, cross-subsidization between the monopoly activities and those open to competition, and that the Canadian government's failure to enforce its competition law was a breach of its obligations under the NAFTA agreement. Specifically, it argued that Canada had breached article of the NAFTA agreement, which imposed a minimum standard of treatment for foreign investors.[160] According to this article, "[e]ach party shall accord to investments of investors of another Party treatment *in accordance with international law*, including fair and equitable treatment and full protection and security."[161] UPS argued that the article also covered anti-competitive practices and should be interpreted broadly.[162]

The question was, therefore, whether there was a customary international law or a treaty obligation to prohibit or regulate anti-competitive practices. The tribunal examined the existence of sufficient state practice and *opinio juris*.[163] Relying on the submissions of Canada, the United States, and Mexico, it concluded that many states do not have competition laws and that the national competition legislation of the NAFTA member states "differs markedly, reflecting their unique economic, social and political environment."[164] According to the tribunal, "there is no indication . . . that any of that legislation was enacted out of a sense of general international legal obligations"; and, therefore, the element of sufficient state practice was absent.[165] It also found that the many bilateral treaties for the protection of investment did not reflect "an understanding of the existence of a generally owed international legal obligation which, moreover, has to relate to the specific matter of requiring controls over anticompetitive behaviour."[166] Furthermore, multilateral treaty and codification processes in the context of the WTO showed that "WTO Members are only now beginning to address the possibility of

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[159] United Parcel Serv. of Am. Inc. v. Gov't of Canada, Award on Jurisdiction (Nov. 22, 2002), available at http://www.dfait-maeci.gc.ca/tna-nac/documents/Jurisdiction%20Award.22Nov02.pdf [hereinafter N.A.F.T.A. Arbitration].
[160] Id. ¶¶ 10, 12.
[161] Id. ¶ 71 (emphasis added).
[162] Id. ¶ 72.
[163] Id. ¶ 84-87.
[164] Id. ¶ 85.
[165] Id.
[166] Id. ¶ 86.

negotiating competition rules on a multilateral basis."[167] Finally, the tribunal determined that the International Law Commission's decision not to regulate the development of anti-competitive practices within individual states indicated that there was "no rule of customary international law prohibiting or regulating anticompetitive behaviour."[168]

The emergence of a customary international rule prohibiting restrictive business practices has also been examined by some domestic courts. For example, in *Kruman v. Christie's International PLC*, the United States District Court for the Southern District of New York rejected the plaintiff's argument, which maintained that anti-competitive activities such as price-fixing have risen to the level of customary international law, as bordering "on the frivolous."[169] Citing the divergence among competition policies of different nations, the court affirmed that "[t]here is no substantial support for the proposition that there is an international consensus proscribing price fixing that fairly might be characterized as customary international law, much less an international consensus that price fixing gives rise to tort claims on behalf of victims."[170] As a consequence of this rather abrupt dismissal, the plaintiffs did not argue this theory on appeal.[171]

A more careful analysis of these decisions reveals that courts failed to examine in depth the possibility of the emergence of a customary international rule prohibiting restrictive business practices. Both the NAFTA tribunal and the district court referred to the absence of antitrust legislation in many countries in order to deny the existence of sufficient state practice. However, for a customary international rule to emerge, the existence of practice in countries representative of the different groups of the international community is enough; there is no need to prove that this practice is shared by an overwhelming majority of states. Indeed, some countries may be concerned about restrictive business practices that affect trade, but may have not yet adopted relevant competition legislation because of the lack of technical expertise or because this will impose a significant administrative burden, which, in light of the size of their economies, could not be justified by the benefits of competition law to their consumers. Moreover, national legislation or decisions of national courts and executive authorities are not the only examples of state

[167] Id. ¶ 87.
[168] Id. ¶ 92.
[169] 129 F. Supp. 2d 620, 627 (S.D.N.Y. 2001).
[170] Id.; see also In re Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702, 717 (D. Md. 2001).
[171] Kruman v. Christie's Int'l Plc., 284 F.3d 384, 392 n.1 (2d Cir. 2002).

practice. One also has to consider comments by governments on draft treaties, statements in international organizations, and the resolutions that these bodies adopt. The courts made no effort to examine these aspects of state conduct.

In addition, a large number of world economies have recently adopted some form of competition legislation. The enactment of competition law by important jurisdictions, such as China[172] and India,[173] may alter courts' conclusions if they see it as reflecting the increasing importance of antitrust legislation worldwide and an international consensus on the objective necessity to tackle restrictive business practices that affect competition and trade. Indeed, in many jurisdictions, the adoption of competition legislation is considered a sign of modernity and economic progress.

The statement of the NAFTA tribunal concerning the absence of bilateral treaties can also be explained by the specific facts of the case. The tribunal considered *only* bilateral treaties concluded for the protection of investment; the tribunal failed to consider the numerous competition law-related provisions that exist in bilateral and regional trade agreements. Neither the tribunal nor the district court referred to the existence of multilateral agreements with competition law-related provisions or to the Set.

Another problem is that these decisions seem to condition the emergence of a customary international rule on the existence of a broad consensus prohibiting specific anti-competitive practices, such as price-fixing or the abuse of a monopoly position. However, complete uniformity of state practice is unnecessary; it is enough that there is a consensus regarding the core principles, even if there is disagreement on the detailed rules. This issue has not been addressed adequately by the decisions. Thus, the emergence of a customary international rule should not be excluded prima facie; the general character of the principles also should be considered. The more general and opaque, the less binding these principles will be. The emergence of a customary rule prohibiting state-sanctioned business practices that affect international trade, such as exempting certain export cartels

[172] The People's Republic of China draft antimonopoly law is in the process of being adopted. For an analysis of earlier initiatives, see Mark Williams, Competition Policy and Law in China, Hong Kong and Taiwan (2005).
[173] See generally The Competition Act, 2002, No. 12, Acts of Parliament, 1993 (India).

from the application of antitrust law,[174] should not be dismissed before a more detailed examination of relevant state practice and *opinio juris* has taken place. The Set should form part of a systematic analysis of all the international treaties (trade agreements, antitrust cooperation agreements) containing competition law-related provisions, and the position of states as expressed in international fora such as the OCDE, the ICN, or the ECN.

In conclusion, the Set does not have any legal binding effect but has the potential to contribute to the emergence of a customary international obligation prohibiting restrictive business practices. It is clear that the numerous bilateral and multilateral international conventions with competition law-related provisions have taken antitrust out of the exclusive domain of domestic jurisdiction.[175] However, the significance of the Set in global antitrust law is not limited to its legal effect. Given its linkage of competition and development, the Set provides a different model of global antitrust law standards than initiatives undertaken in other fora, such as the WTO, the OECD, or the ICN. The next Part will therefore focus on the relation between competition and development.

II. Competition policy and Development

There are important links between competition policy and economic development/growth. First, there are indications that more competition enhances the development potential of an economy (A). Second, it is also widely accepted that competition promotes institutional innovation and the emergence of efficient institutions that support economic growth (B). Competition law is an important dimension of competition policy and should be conceived in a much broader perspective than simply antitrust rules, merger control of a system of competition law enforcement (C)

[174] For example, export cartels are exempted from the application of antitrust laws in the United States under the Webb-Pomerene Act, 15 U.S.C. §§ 61-66 (2000), and the Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1223 (codified in scattered sections of 12, 15 and 30 U.S.C.).

[175] See UNCTAD, Experiences Gained So Far on International Cooperation on Competition Policy Issues and the Mechanisms Used, TD/B/COM.2/CPL/21/Rev.1 (Apr. 19, 2002) (providing an overview of the different international treaties in this field).

A. Competition policy promotes economic development

Yang and Borland have shown the importance of multiplication of markets for growth- the process of development is characterized by specialization and productivity increase associated with the division of labor that is only possible with market expansion and multiplication.[176] The second strand of the recent literature is the dynamics of firms that shows the importance of the turnover of firms, entry and exit, and the growth and success of these firms in successive waves of technological growth. This is, only to some extent, the Schumpeterian process of "destructive creation". There are two processes operating at the micro level: the shift of resources from less productive to more productive firms, and the expansion of the more productive firms by technological improvements, as in the work of Haltiwanger[177] and others. These two mechanisms: the division of labor with market expansion and the dynamics of firms that lead to productivity increase are largely driven by competition. The main link in today's Industrial Organization models is between competition and dynamic efficiency as in Spence's seminal paper.[178] There are generally four channels that have been corroborated empirically. First, competition creates a larger number of opportunities for benchmarking, so the market can monitor firm management[179] Second, innovations tend to increase productivity and reduce costs generating a higher level of profits in a competitive environment, where demand price elasticities are higher[180]. Third, higher levels of competition increase the probability of failure which is an incentive for management to be more efficient[181]. Fourth, workers share in rents, so higher competition leads also to a higher effort[182].

[176] See Y. Yang and J. Borland, "A microeconomic mechanism for economic growth", Journal of Political Economy, 99 (1991) (3): 460-482

[177] J. Haltiwanger, "Aggregate growth: what have we learned from microeconomic evidence", OECD Economics Department Working Paper 267, 2000

[178] M. Spence, "Cost reduction, competition and industry performance", Econometrica, 51 (1984) (1): 101-121

[179] Important contributions are E. Lazear and S. Rosen, "Rank-order tournaments as optimal labor contracts", Journal of Political Economy, 89 (1981): 841-864; and, B. Nalebuff and J. Stiglitz, "Information, competition and markets", American Economic Review, 73 (1983), May: 278-293.

[180] S. Nickel, D. Nickolitsas and N. Dryden, "What makes firms perform well?", European Economic Review, 41 (1997): 783-796.

[181] P. Aghion, M. Dewatripoint and P. Rey, "Corporate governance, competition policy and industrial policy", European Economic Review, 41 (1997) 797-805

[182] J. Haskel, J. "Imperfect competition, work practices and productivity growth", Oxford Bulletin of Economics and Statistics, 53(1991), (3) 265-279

The Schumpeterian models that dominated the 1990s, arguing that in order to generate innovation we need monopolies,[183] are not only misleading, but are also subject to contradictions, as in the seminal models of endogenous growth of Aghion and Howitt[184] and Grossman and Helpman[185]. E.g., how can the entrants that had no profits, use large amounts of financial resources to finance R&D, before entering the market?[186]

Focusing on the different channels through which competition influences innovation, we could distinguish, among others: (i) The Darwinian effect introduced by Aghion[187] and Portes[188] (ii) The "neck-and-neck" effect[189], (iii) The Arrow effect[190]; and (iv) The mobility effect (skilled workers become more adaptable and will switch to more productive industries faster[191],[192]). Second, competition may lower the pre-innovation rents by more than post-innovation rents so it increases the after innovation profits, eliminating the Schumpeterian effect. Third, empirical evidence on patents and other IPRs shows that the impact of patenting is only beneficial in some intensive R&D subsectors, like pharmaceuticals or heavy chemicals. Only in these cases the Schumpeterian effect is important. These two cases may lead to the empirical finding of a U curve by Aghion[193], with empirical data relating market structure to innovation.[194]

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[183] There are a lot of variants of this doctrine from the stricter that we need big firms to generate innovation to the broader that industrial policies should take precedence to competition polices or that too much competition is bad for development.

[184] P. Aghion and P. Howitt, "A model of growth through creative destruction", Econometrica 60 (1992) 323-351 and P. Aghion and P. Howitt, Endogenous Growth Theory, Cambridge, MA: MIT Press, 1998

[185] G. Grossman and E. Helpman, Innovation and Growth in the Global Economy, Cambridge, MA: MIT Press, 1991

[186] In fact, narrowing down the link between competition and I&D as the core of dynamic efficiency, as in recent controversies mainly about IPRs, is erroneous and deceptive.

[187] P. Aghion, C. Harris, P. Howitt and J. Vickers, "Competition, Imitation and Growth in a Step-by-Step Innovation", The Review of Economics Studies, 68 (2001) 467-492.

[188] M. Porter, The Competitive Advantage of Nations, London: Macmillan Press, 2000;

[189] P. Aghion and R. Griffith, Competition and Growth: Reconciling Theory and Evidence, Cambridge, MA: MIT Press (2005)

[190] K. Arrow, "Economic Welfare and the Allocation of Resources for Inventions", In R. Nelson, ed., The Rate and Direction of Inventive Activity: Economic and Social Factors, Princeton: Princeton University Press, 1962

[191] R. E. Lucas, "On the mechanics of economic development", Journal of Monetary Economics, 22 (1988) 3-42

[192] See Aghion and Howitt footnote 12.

[193] P. Aghion, R. Blundell, R. Griffith, P. Howitt, and S. Prantl (2003), "Entry and Productivity Growth: Evidence from Micro-Level Panel Data", Journal of the European Economic Association, Papers and Proceedings 2 (2003) 265-276.

[194] However, these empirical models narrow immediately the problem. They relate some measure of market concentration to the number of patents, citations or any other related

There is now important empirical evidence that competition is linked to growth in developed countries. Disney et al.[195] concludes that competition increases productivity levels and the rate of growth of productivity. Recently, Bloom and van Reenen[196] show that good management practices are strongly associated with productivity and those are better when product market competition is higher. Finally, an efficient market for corporate control with open rules for takeovers reinforces the impact of competition on productivity[197]. Other studies by Blundell et al.[198] and Aghion and Griffith [199] also confirm the above results. A study for Australia shows that competition enhancing reforms in the 1990s contributed to an increase in GDP.[200]

Research in developing countries has also shown the importance of the link between competition and development. Dutz and Hairy[201] find that competition policy has a positive impact on growth, even after taking into consideration the contribution of trade and institutional policies. Reviewing a large number of studies in the 1990s, Tybout [202] concludes that there is evidence that protection increases price-cost margins and reduce efficiency at the margin, and that exporters (firms that succeed in the international market), are more efficient than non-exporters. Using a new data set for Latin America, Haltiwanger et al. [203] confirm that trade liberalization and competition leads to higher levels of efficiency at the firm level and also to reallocation of resources to more productive sectors. Using data for Colombia Eslava et al.[204] (2004) show that trade and financial reforms of the 1990s were associated

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measure related with R&D. The empirical work has been carried out for the UK, a developed country.

[195] R. Disney, J. Haskel and Y. Heden, "Restructuring and productivity growth in UK manufacturing", Economic Journal, 113 (2003): 666-694

[196] N Bloom and J. van Reenen, "Measuring and explaining management practices across firms and across countries", CEP Discussion Paper 716, 2006

[197] S. Nickel, D. Nickolitsas and N. Dryden, "What makes firms perform well?". European Economic Review, 41 (1997) 783-796 and S. Januszewski, J. Koke and J. Winter (2001). "Product market competition, corporate governance and firm performance: an empirical analysis for Germany", mimeo, 2001

[198] R. Blundell, R. Griffith and J. van Reenen, "Market share, market value and innovation in a panel of British manufacturing sector", Review of Economic Studies, 66(3) (1999): 529-554

[199] See footnote 16

[200] OECD, Sources of Economic Growth. Paris, 2003

[201] M. Dutz and H. Hayri,. "Does more intense competition lead to higher growth?" World Bank Policy Research Working Paper 2320, 2000

[202] J. Tybout, "Manufacturing firms in developing countries: how well they do and why?", World Bank Policy Research Working Paper 1965, 1998

[203] J. Haltiwanger, A. Kugler, M. Kugler, A. Mico and C. Pages, "Effects of Tariffs and Real Exchange Rates on Job Reallocation: Evidence from Latin America", August, 2004, mimeo.

[204] M. Eslava, J. Haltiwanger, A. Kugler and M. Kugler, "The effects of structural reforms on productivity and profitability enhancing reallocation: evidence from Colombia", Journal of Development Economics, 75 (2004) 333-371.

with productivity increases resulting of reallocation from low to high productivity firms. Similar evidence has been shown for Chile[205] and Brazil[206] due to trade liberalization and for India due to the elimination of the Raj licensing scheme.[207] Aghion et al.[208] show evidence that increasing competition in South Africa manufacturing should have "large productivity effects".

Aghion and Schenkerman[209] even found situations where countries can find themselves in a competition trap that blocks growth. Those most vulnerable are when the initial level of competition is low, the initial degree of cost asymmetry among firms is low and politicians are less driven by social welfare concerns.

B. Competition promotes institutional innovation

Olson's[210] theory of collective action employs the concept of distributional coalition, a group whose collective action can secure a larger share of the resources generated by the economy to its members, at the expense of the population at large, to explain why some countries grow and others stagnate.

Olson also addresses the important issue of the time dimension. How can a prospering country fall into a phase of stagnation? In a stable society distributional coalitions gradually find way to solve their collective action problems. Once they are formed and established they prefer the status quo and are likely to oppose innovations that would increase the growth rate of the economy. Thus, coalitions can trap a society into a stagnant economic state. Parente and Prescott[211] build a formal model that captures the idea that insider groups that operate with a given technology may oppose the introduction of innovations and thus block economic growth.

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[205] P. Ferreira and J. Rossi, "New Evidence from Brazil on Trade Liberalization and Productivity Growth", International Economic Review, 44, 4 (2003) 1383-1405.

[206] N. Pacvnick, "Trade Liberalization, Exit and Productivity Improvements: Evidence form Chilean Firms", The Review of Economic Studies, 69, (2002) 245-272.

[207] P. Aghion, R. Burgess, S. Redding and F. Zibilotti, "Entry Liberalization and Inequality in Industrial Performance", Harvard University, mimeo., 2004

[208] P. Aghion, M. Braun and J. Fedderk, "Competition and Productivity Growth in South Africa", mimeo., 2007

[209] P. Aghion and M. Schankerman "On the welfare effects and political economy of competition-enhancing policies", Economic Journal, 114, October(2004): 800-824

[210] M. Olson, The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities, New Haven, CT: Yale University Press, 1982

[211] S. Parente and E. Prescott, "Monopoly rights: barriers to riches", American Economic Review, 89(5) (1999) 1216-1232

Grossman and Helpman[212] build a simpler, but very insightful model, to explain why there are different protection rates in external trade by industries and sectors.[213] In their model special-interest groups, organized in lobbies, make contributions in order to bias the government choice of trade policy in their favor. Politicians maximize a two-part welfare function that depends on those contributions collected and the welfare of voters at large, because they need them for reelection. The need for party financing and particularly campaign financing in a democratic state leads politicians to put "protection for sale". The model generates a set of protection rates that obey a Ramsey modified rule. This is a type of common agency problem where an agent (the government or political party) acts in the name of several principals (interest groups), while bearing a cost for the implementation of the policy in terms of welfare costs of protection.[214]

Mitra[215] extends the work of Grossman and Helpman to show that greater inequality in income or wealth distribution leads to a higher rate of rent extraction from lobbies and thus lowers social welfare. He also shows that industries with higher capital intensity, which are more concentrated and have inelastic demand have stronger lobbies. [216] A test of the "protection for sale" model by Gawande and Bandyopadhyay[217] for the US gives high marks to that theory.

Acemoglu, Aghion and Zilibotti[218] also tackle an issue in the line of Parente-Prescott: a change in policy by the government against vested interests would increase the level of development, because societies can be trapped with the "inappropriate institutions" and relatively backward technologies. In their model, the authors prove the existence of a dynamic equilibrium and the possible occurrence of a political economy trap

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[212] G. Grossman and E. Helpman, "Protection for Sale", American Economic Review, 84(4) (1994) 833-850

[213] The model is generalized to all types of taxation and subsidies by A. Dixit, "Special-interest lobbying and endogenous commodity taxation", Eastern Economic Journal, 22(4) (1996)375-388

[214] These are largely consumer surplus costs and may also be producer surplus in industries that have to pay a higher price for their inputs. These costs may translate in lower votes to the government.

[215] D. Mitra, "Endogenous lobbying formation and endogenous protection: a long-run model of policy determination", American Economic Review, 89(5) (1999) 1116-1134

[216] Infrastructure sectors satisfy these conditions. They also benefit from high natural protection.

[217] K. Gawande and U. Bandyopadhyay, "Is Protection for sale? Evidence on the Grossman-Helpman theory of endogenous protection", Review of Economics and Statistics, 82(1) (2000) 139-152

[218] D. Acemoglu, P. Aghion and F. Zilibotti, "Distance to frontier, selection and economic growth", NBER Working Paper 9066, 2002

where capitalists bribe the government in order to maintain a regime of monopoly rents with low competition that ends up blocking growth over the long-term. Such trap is more likely in societies with weak institutions (more corruptible).

Another strand of the literature links competition, rents and corruption. Andes and di Tela[219] built a model of compensation and corruption for government agencies.[220] They claim that when the principal (the people) pursues multiple and diffuse objectives, state contingent contracts with the agent (government) are hard to write and rents have to be allocated to enhance performance. A similar agency problem may occur between another principal (government) and the agent being the bureaucracy. The authors use an efficiency wage theory to determine the optimal level of corruption. When a firm under the influence of a bureaucrat enjoys rents, the value of his control rights is high. Bureaucrats can trade part of this control in exchange for bribes. Then, in a regime of monopolies, with higher rents, there would be higher level of corruption compared with a more competitive world. In fact, their empirical analysis corroborates this view. The problem is particularly acute in an oligarchy and when those vested interests represent small groups, like traditionally powerful family groups.

As we will discuss below, anti-competitive policies influence the economy in multiple ways:

a) Create distortions in the economy with static and dynamic effects

b) Appropriate resources or increase rents to these groups increasing inequality and may decrease productivity of the economy

c) Deviate resources from more productive to less productive sectors or industries

d) Prevent the process of creative destruction to take place

e) Block the entry of new firms

[219] A. Andes and R. di Tela, "Rents, competition and corruption", American Economic Review, 89(4) (1999) 982-993

[220] There is a large literature on corruption and non-directly-productive activities that deal with "petty" corruption in public administration and bureaucracies and which is only lateral to our analysis. Unless corruption at all levels of administration is rampant, this type of corruption is dwarfed by capture of governments by vested interests.

The economic production is thus limited inside the Production Possibility Frontier due to the misallocation of resources, which has static and dynamic effects, and may lead to political economy traps and generate growth collapses.

The first empirical work that tried to measure these effects directly around the world has been undertaken at the World Bank by Kaufman and others under the umbrella of "governance and capture". Kaufman calls this type of behavior "legal corruption", in the sense that corporations can lobby or obtain certain policy measures that may not be illegal but increase their rents at the cost of social welfare. Transparency International that collects data on corruption does not cover this type of behavior, and has proposed the concept of "misuse of entrusted power for private gains".[221] One of the pioneering works on state capture by firms and its implications was carried out by the World Bank on Transition economies at the end of the 1990s.[222] According to the authors, the "leviathan" state is being replaced by the oligarchs who "capture the state", the policy and law environment is molded to the captor firm's advantage, at considerable social cost.

Based on the Business Environment and Enterprise Performance Survey they study three potential interactions between the firms and the state in 21 transition countries: (i) administrative corruption: when firms make illicit and non-transparent private payments to public officials to alter administrative regulations; (ii) state capture: when firms make illicit and non-transparent private payments to public officials in order to influence the formation of laws, rules, regulations or decrees by state institutions, including the courts; and (iii) influence: extent to which firms influence the formation of those laws or decrees without recourse to payments. The private gains to capture are quite substantial. They find that captor firms grew about four times more than other firms in high captured countries, but in the regression results it seems that capture does not lead to higher levels of investment.[223] It is not only incumbent firms that engage in capture. There is a sample of new entrants that also engages in capturing in order to get more secure property rights and contractual advantages.

The challenge is how to structure institutions to limit the influence of vested interests in policy formulation, limit their rent extraction and give a major voice to the interests

[221] See http://www.transparency.org/news_room/faq/corruption_faq

[222] See J. Hellman, G. Jones and D. Kaufman, "Seize the State, Seize the Day". World Bank Policy Research Working Paper, 2000.

[223] This would be consistent with the hypothesis that the additional rents are not always used productively.

that embody social welfare. Most of the existing literature in competition policy and competition law takes for granted that socio-political institutions control excess economic and political power and the role of vested interests. This may be true in the vast majority of democratic societies. Particularly important is the constitutional regime that establishes the independence and balance of power between the three branches of the state: executive, legislative and judiciary.

C. Competition policies as a foundation for competition law regimes

As defined above, competition policies give the framework for markets and thus largely influence resource allocation required for economic development. In fact, a discussion of competition policies and other policies that are related with the functioning of the market should precede any discussion of competition law regimes. They are the context in which competition law and enforcement takes place. E.g. can we discuss, in a small developing country, abuses of dominance if there are high barriers to external trade? And, if large parts of the economy are monopolized? Or, what is the purpose of having a competition authority if government favors the formation and protects national champions?

The policies that are more directly related with the functioning of the market and that can promote more competitive outcomes are market infrastructure policies, external trade policies, entry and exit of firms policies, licensing, privatization, investment policies, procurement, regulation and innovation policies. It is also important to emphasize that in developing countries structural policies regarding the formation and functioning of markets are more important and are the pre-condition for any policy regime.

In developed countries we take for granted that most of markets exist,[224] and that markets' infrastructures function. However, in developing countries quite a number of markets do not exist or do not function with a minimum efficiency. In order for a market of a certain good or service to operate there has to be supply and demand but also a way for both to match and establish equilibrium. Physical infrastructure like transportation and information networks may not exist or function properly or there might be too much market fragmentation. E.g. a well functioning market for an agricultural commodity requires an articulated system of producer, wholesale and export markets. It requires the physical infrastructure for trade, storage and handling.

[224] We do not enter here into the discussion of private versus public goods.

It requires a well functioning system of price information from the world level up to the local level. It also requires financing and insurance by-markets.[225]

Yang and Borland[226] have identified that for development to occur markets have to multiply and generate specialization. Few economists would contest the major role that creating infrastructure and markets that link up the agriculture hinterland with the coastal urban areas is a precondition for growth (market multiplication), or to give an historical example in Europe, that the Zollverein had a major role in the development of Germany (integration of fragmented markets). And as the geography of development shows, [227] we have to think in terms of local, national, regional and global markets. Thus, as a precondition for any competition or market policy the country needs to build its markets and market infrastructure.

The second most important policy in developing countries for competition is external trade policy. In fact, reducing the level of protection and exposing the tradable sector to external competition increases the level of rivalry in domestic markets. It has been shown both theoretically and in practice, that reducing tariffs and quantitative restrictions leads to resource reallocation in favor of more productive sectors, specialization and to increases in productivity as firms both import more technological advanced capital and improve their methods of operation to compete either with imports or in external markets.[228]

The opening of economies is particularly important for small economies, and the exposure to foreign competition may reduce substantially market concentration in the tradable goods sector. Moreover, the expansion of markets due to the access to world markets, and particularly developed countries markets that are much larger, allows domestic firms to reap significantly economies of scale.

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[225] The experience in several African countries has also shown the need of complementary markets. E.g. the export of cashew nuts in the North of Mozambique did not take off before there were manufactured goods available in local markets in order for the farmers to trade their agricultural surplus with clothing, shoes, bicycles and other goods that they needed. On a larger scale, in the old socialist countries there were not enough consumer goods for workers to buy. This fact limited the value of their wages and affected the incentive to work and innovate.

[226] See footnote 4.

[227] The World Bank has surveyed the literature in this area in World Bank, Reshaping Economic Geography, World Development Report, 2009.

[228] For empirical evidence see the empirical studies for Latin America, Asia and South Africa cited in section 2 above.

However, developing countries still use external protection and industrial policies. Besides the traditional "infant industry argument" due to learning-by -doing[229], there is the national champions justification: the argument is the need to create powerful national business groups in order to locate in the country "the centre of decision" of their industry or service sector (energy and banking are some of the sectors widely used).[230] Another argument is the need to strengthen a particular group because it has accumulated management expertise, with specific human capital that is scarce in the country. A third reason is that the country needs to build a large national champion in order to have access to finance and have the scale to expand into the international market. These are examples of industrial and other policies that are in conflict with competition policies and may contribute to build the "competition traps" identified above. Sometimes they are strengthened by having tight rules against takeovers.

Using the Grossman-Helpman model we can say that the higher the role of vested interests and the more they are concentrated, the higher the level of protection. Moreover, Andes and di Tela find also evidence that corruption is higher in countries where domestic firms are sheltered from foreign competition by natural or policy induced barriers to trade, with economies dominated by a few number of firms, or where antitrust regulations are not effective in preventing anticompetitive practices. The size of the effect is rather large: almost a third of the corruption gap between Italy and Austria can be explained by Italy's lower exposure to foreign competition. They also find some evidence, using indicators from the World Competitiveness Report that the degree of concentration in the economy increases the level of corruption and that antitrust laws decrease that level.

In our opinion, the external trade policy is a core policy for promoting competition in developing countries and is the pre-requisite for any antitrust law regimes. Thus, in order to improve market functioning in the tradable sector, governments need to eliminate quantitative restrictions and reduce tariffs to a low level (trade liberalization), avoid major differences in the rates of protection across all sectors and pay particular attention to policies for technology transfer.

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[229] As is well known, a production subsidy is a superior policy. But if there are scarce budget resources athird best policy is temporary and regressive protection.

[230] Governments defend that when major decisions will come up to the shareholders or management like locating a new factory or closing a given operation they will take into consideration their own "nationality".

Countries that are rich in natural resources and have their major exports dependent on a single or a few commodities also need to pay particular attention to the integration of that sector with the rest of the economy. E.g. most of the countries dependent on a major mineral commodity tend to exploit that resource by monopoly.[231] However, in the presence of weak institutions, this may lead to the phenomena of the "natural resource trap" studied by P. Collier with regards to some African countries.[232] Large amounts of resources may be appropriated by the state and vested interests, without proper accountability. Collier has proposed codes of conduct and transparency with a major contribution from multinationals cooperating in the exploitation of those resources and national governments involved.

However, external trade policies do not inject competition in the non-tradables sector, comprising telecommunications, energy, construction, distribution and financial and business services, among others. Thus, governments need to promote the functioning of efficient markets in those sectors. In developing countries, more important and previous to any competition law are structural policies directed first at building efficient and competitive market structures in those sectors. Let us look at some of the sector policies that are required.

Licensing, procurement and privatization policies are the most important instruments to shape these markets. E.g. offering through a simple decree or a "beauty contest" a public enterprise, or a license for a given infrastructure, will create a private monopoly, a clearly inefficient market structure with major negative impact on social welfare. The way governments use to give out such privilege may be from an outright "legal monopoly"[233], using concessions biased towards the firm and sometimes with costly clauses to the economy[234], or camouflaged in "universal service" clauses.[235] When structuring privatization or licensing, governments should take into consideration the market structure that they are creating and in particular they impact

[231] This structure may have been inherited from the colonial times, where a mineral or agriculture enclave was often isolated from the rest of the economy and integrated into the imperial power.

[232] P. Collier, The Bottom Billion, Oxford University Press, 2008, page 38 and following.

[233] In the 19th century in several European countries the tobacco monopoly was a source of acquisition of major wealth.

[234] In Portugal, the concession of all the bridges that cross the Tagus River in Lisbon was awarded to a single consortium. The Audit Court raised serious doubts about the clauses contained in the contract that were in favor of the private firm. According to our estimates, the clauses led to a real rate of return to capital of about 19%. See A. Mateus and M. Mateus. Microeconomia: aplicações e casos, II volume, Editorial Verbo, 2002.

[235] A case in point is the Telmex case – the Mexican government argued that it needed to charge high tariffs to users in the US to finance services in the rural poor areas.

on competition.[236] This need should be balanced against the need to solve the agency problem in the corporation of providing a stable and strong shareholder nucleus. In particular, ministries of finance are often interested in maximizing the financial intake of the sale in order to reduce public debt, but that objective should be traded-off against concerns for building a competitive market.

In fact, infrastructure sectors like telecommunications, energy, banking, large scale construction, water and transportation have been the favored sectors for vested interests to establish their monopoly or quasi-monopoly positions. Monopolies in infrastructure sectors that produce goods or services used widely by other firms in the economy can produce a great damage to the competitiveness and growth of the overall economy. In some economies those over-charges in terms of the excess costs paid for inputs by the rest of the economy can amount to 3 to 6% of GDP.[237] Sectors that are particularly affected are the small and medium enterprises, usually the most important for employment and exports. Cross-ownership or bargaining power sometimes lowers the costs of large enterprises elsewhere in the economy, but consumers at large have no alternative but to pay the cost of those services.

Theoretically the way to solve the problem of natural monopolies is to regulate them. But quite often sector regulators in developing countries with weak institutions are captured by the firms that are regulated.[238] Abuses of dominant position, overpricing and other behavior are usually tolerated with justifications that "play well": need for additional investments, need to "expand abroad" and high profits show that is an "efficient firm" with good performance in capital markets.

Consequently, the most important way to solve these problems is by injecting competition in the infrastructure markets. One way is to un-bundle market structure, separating the natural monopoly components, like telecom and electricity or gas

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[236] A very important example is the privatization of telecom companies that in some countries led to the break-up of the state monopoly along companies with different networks that can compete among each other. Or the break-up of a state electricity firm by unbundling their activities. A recent case with much success was the privatization of the telecom state monopoly in Turkey.

[237] Assume that the non-tradables in quasi-monopoly situations represent about 20% of GDP and that they overcharge 20 to 30%, which is not extraordinary, as price data collected by OCDE for utilities show. Then just the direct impact would be 4 to 6% of GDP.

[238] The problem is aggravated by the lack of human capital. For example, when in the early 1990s the government of Portugal decided to set up regulators for telecommunications and energy went to the recently privatized state monopolies to get the experts to staff those regulators. In most of the cases they have retained their old employment links. These problems were not specific to Portugal but affected quite a number of countries where there is a shortage of specialists in a given sector.

networks from production, and import from distribution. Simultaneously, the government should impose an open access policy to the natural monopoly components.

Large investment projects and state procurement are also very important to promote competitive markets. Building a country's infrastructure (motorways, railways, airports, large bridges, urban complexes) mobilizes a large amount of the country's resources. Thus, in order to promote an efficient resource allocation, they need to be subject to a rigorous project evaluation, be implemented in a timely fashion and be financed by adequate means. Sometimes these projects are oversized or run into large over-costs, as the well known "white elephants".[239] In addition, they need to be subject to competitive bidding, so the execution is awarded to the least cost contractor, and works need to be properly and independently supervised. By introducing competitive bidding in project execution and supplies of goods and services to the state, governments are contributing to the reduction of bribing and preventing bid rigging at the expense of taxpayers.

There are a number of other important policies required for the functioning of efficient competitive markets that we cannot dwell on for lack of space. Policies related with entry and exit of firms and market mobility in general are also very important. When there are costly regulations to set-up business or to operate it, the phenomena of informality takes large chunks of the economy, with clear inefficiency.[240] And even fiscal and monetary policies can have important competitive market implications. When the law stipulates fiscal loopholes and tax evasion is tolerated, firms in dominant positions may acquire an unfair advantage vis-à-vis their smaller competitors. Furthermore, there can be competition distortions when firms in a dominant position have access to credit or capital markets beyond what a proper risk analysis would dictate.

These are all policies that have to be taken into account when defining a competition law regime. They constitute the foundation in which a competition law regime operates. They should also be used in defining, on a case by case analysis, the different thresholds for defining the above regimes, together with other institutional

[239] Social costs may be higher when recurrent costs cannot be covered by revenues, leading to large current subsidies by the state.

[240] De Sotto has contributed to this analysis. See H. De Sotto, The Other Path: The Economic Answer to Terrorism, Basic Books, 2002.

elements. We now turn to the analysis of the other institutional elements required to define the competition law an enforcement regime.

III. Competition law enforcement models conditioned by the level of institutional development

The theory of the design of optimal competition rules is still largely undeveloped, when compared with regulation, fiscal or monetary policies. This is the result of the multivariate characteristic of most competition policy problems. E.g. the problem of coordinating strategies (cartels) is fundamentally different from the one of exclusionary practices (abuses of dominance). But we could raise the bar of abstraction and consider that all competition law decisions are taken in a world of uncertainty and asymmetric information and apply decision theory. Although all decisions are about individual cases, a rule-based approach is preferable. This is in line with general insights from the theory of economic policy concerning the superiority of policies based upon rules rather than on discretionary decisions that might be influenced from high levels of corruption.

We see at least three advantages. First, rules anchor expectations, reducing legal uncertainty and informing firms' behavior. Uncertainty can lead both to over or under-deterrence, and cause long lags in decision making with pernicious effects on efficiency and welfare. Second, rules reduce rent-seeking, as emphasized by Buchanan and the constitutional law and economics approach. Third, rules mitigate knowledge problems by benevolent governments, agencies and courts, if we take into account that a rule-based system uses much less information than a case by case approach and thus reduces decision errors. The "much more economic approach" has led some economists[241] to sketch a proposal of an optimal differentiated competition rule which is determined by minimizing error costs and regulation costs. In fact, legal decisions are taken in a world of uncertainty and imperfect information. Joskow[242] has called attention to the need to take into consideration that competition law regulates agents' market decisions, involving always transaction costs. One of the concerns of policy should be to minimize those costs. Another approach is the decision theoretical

[241] E.g. A. Christiansen and W. Kerber, "Competition policy with optimal differentiated rules instead of "per se rules versus rule of reason"", University of Marburg Working Paper 6-2006

[242] P. Joskow, "Transaction cost economics, antitrust rules and remedies", Journal of Law, Economics and Organization, 18(1) (2002) 95-116

model that minimizes type I and type II errors. In both cases we are lead to a general formulation of the law as a "structured rule of reason".

The differentiation of competition rules can also involve a sequential multi-stage process of assessment and screening. E.g. by using simple low-cost information, like "safe harbor-rules" at an initial stage, a number of unproblematic cases can be filtered out, whereas for the remaining cases, in a second step, more information gathering and additional assessment methods are applied.[243]

Avoiding discretionary behavior by the state is very important. Research on the quality of regulation by Levy and Spiller[244] is relevant for antitrust enforcement. These examine how political institutions interact with regulatory processes and economic conditions in determining the potential for administrative manipulation, and hence the economic performance of the particular sector. They show that what is important is that institutions and mechanisms restrict the degree of arbitrariness and administrative discretion. This means that regulatory systems should be clear and stable. In fact, a large variety of regulatory rules may lead to an efficient outcome (e.g. price caps, incentive schemes and use of competition), if those conditions are satisfied. They also found that the political and social infrastructure is very important to limit arbitrariness and administrative discretion.

Christiansen and Kerber[245] show that the optimal differentiation rule equals the marginal benefits deriving from reducing type I and type II errors with the marginal costs of regulation, i.e., acquiring more information, more transaction costs, and further delays. Therefore, it is worthwhile to increase the fineness of the rules, by establishing additional criteria and analysis of pro-competitive and anti-competitive factors, up to the point that the additional regulation costs are equal to the reduction in decision errors.[246] For weaker institutional levels the information and transaction costs become larger, as information is not easily available and weak institutions, like

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[243] As C. Beckner III and S. Salop, "Decision theory and antitrust rules", Antitrust Law Journal, 67 (1999) 41-76, have proposed.

[244] B. Levy and P. Spiller, "The Institutional Foundations of Regulatory Commitment: a comparative study of telecommunications regulation". Journal of Law, Economics and Organization. 10-2 (1994).

[245] See footnote 66.

[246] This follows from the important insight by Easterbrook that applying more general rules instead of a case-by-case investigation can economize on information and decision costs. See F. Easterbrook,. "Ignorance and antitrust", in T. Jorde and D. Teece, eds.. Antitrust, innovation and competitiveness. New York: Oxford University Press, 119-136, 1992.

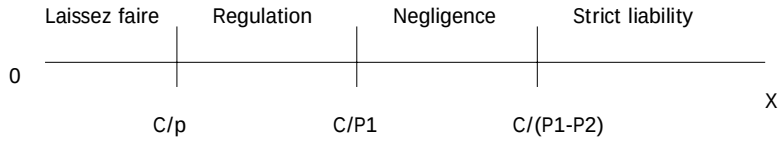
protection of contracts, lead to higher transaction costs. As a result, rules have to be less sophisticated and more errors have inevitably to be tolerated.

We introduce a theory of competition enforcement based on the theory of law enforcement in regulation developed by Glaeser and Shleifer[247] to explain the "rise of the regulatory state". Their theory is based on the theory of torts of Posner and Becker: the goal of social control of torts is to elicit the optimal precaution of damages. Fundamental to the analysis is the introduction of the possibility of subversion and limitations of law enforcement according to the level of development of institutions in the country. There are two levels of precaution: low (Q1) and high (Q2) and two associated probabilities of causing harm P1>P2. In antitrust, precaution should be understood as the actions that firms take to prevent antitrust behavior. Let D be the harm (damage) caused by the practice, *C the opportunity cost* of the firm by not adopting the anti-competitive practice in state 2, which is zero in state 1. S is a scale variable. There are two types of firms: type A "good firms" (like small and medium enterprises) and B "bad firms", with PA<P1. It is not socially optimal for firms A to invest in precaution. We assume that precaution (not carrying the practice) is socially valuable so (P1-P2)D>C, and that regulation is useful: p>P1, where p is the probability that regulator learns that firms chose a low level of precaution. This means that it is inexpensive (certain) to detect lack of precaution. We designate by *X the payment the firm has to make in order to avoid paying a fine*, either in legal fees, lobbying or political protection. It can also be interpreted as the maximum fine that can be enforced without subversion.

There are three law enforcement rules: (1) Strict liability: in case harm occurs and is detected then the firm has to pay a fine. Because this enforcement rule uses less information, it requires a higher fine; (2) Negligence: one has to identify that harm occurs and that the firm took a low level of precaution; (3) Regulation: requires that high level of precaution be taken, if not, the firm pays a low fine, F. This enforcement regime uses a low level of information. The regulator cannot distinguish between firms type A or B. Every firm is going to avoid antitrust if pF>SC, or F>SC/p (minimum fine). Now let us introduce subversion, which is the sum of lobbying costs and "buying" political protection. This cost is paid after detection but before a fine is finely hand down by a court, without any additional appeal allowed.

[247] E. Glaeser and A. Schleifer, "The rise of the regulatory state", Journal of Economic Literature, 41(2) (2003) 401-425

Central to this stage theory of enforcement is the fact that higher levels of enforcement require more information and higher fines and those are more subject to extortion. Enforcement runs a race neck-and-neck to extortion by vested interests. The next figure summarizes the results in an axis that orders the different regimes for different levels of subversion by vested interests (for PA<P1)



For high levels of subversion (low level of law enforcement), pX<CS, which means that the costs of subversion are lower than the cost of precaution for Q2, then a laissez faire approach is the best. (In the Figure above would be X<(CS/P), with S=1, the left segment). For intermediate levels of law enforcement then regulation (high powered tests, "bright lines") is best, with lower fines, but general prevention of harm. This enforcement system requires low levels because it prevents generally antitrust, with a low level of discretion by the law enforcement system. However, it is never efficient because it requires also that firms type A invest in precaution. For higher levels of enforcement, only strict liability or negligence can achieve first best. Strict liability requires high barriers to the subversion of justice (high X) and has no distortions.

Proposition: For each level of institutional development there is an optimal degree of differentiation in the competition rule that minimizes costs of information and transaction. But those rules also vary with the level of institutional development. If the level of capture of the government is high, or the costs of subversion of the legal system are low, then our conclusion is that there should not be any competition statute. As subversion costs increase and is optimal to introduce a competition statute, individual fines imposed by law and actually enforced have to be higher than per case subversion costs (legal costs, bribing, lobbying costs plus political costs). [248] Negligence is the first best regime when the probability of being detected to violate a more common practice times unit costs of subversion (or fine) is higher than the opportunity cost to the firm (profits lost) to restrict competition.[249] Both negligence

[248] Otherwise the firm chooses to subvert the system, which is less expensive.
[249] Otherwise the firm chooses to undertake the restrictive practice. If caught then subverts the system and these costs are lower than what it gains from the profit increase due to the practice.

and strict liability are first best if the unit costs of subversion (or fine) are higher than the opportunity cost to the firm (profits lost) restricting competition, weighted by the cost of an increased level of precaution (P1-P2).

It is easy to see from the proposition that countries that have a low cost of subversion, i.e. that have weak institutions, should have a low fine. But the problem is that a low fine is not dissuasive. The country is caught in a "law enforcement trap". Moreover, in general for these countries information costs are high and it is costly for competition authorities or a private firm to make a case. In this case, the best system is to have a simple system of competition rules that can be easily verifiable. As the level of institutional capacity increases then the country can afford to increase fines (to dissuade unlawful antitrust behavior) and to impose more sophisticated rules to define damages and causation, which require a higher level of information.

Antitrust instruments can also be used for favoring interest groups and extortion as is evidenced by several cases. Merger control might be used to stop mergers among firms that may reduce the market power of a dominant firm that is part of a vested interest group, but mergers by dominant firms that absorb (predate) smaller ones are authorized. Anti-cartel laws may be used to prosecute agreements among small firms that may pose a threat to the market power of dominant firms. Vertical restraints may block use of franchising or other arrangements that may be a threat to a domestic dominant firm. Glasear and Shleifer[250] refer to the case of Russia that introduced an anti-monopoly law and an anti-monopoly Commission in 1992 to address the problems of industrial consolidation. They note that the oligarchy supported the introduction of regulation but not of an antimonopoly authority. In the beginning, this authority, instead of regulating mergers involving large firms, compiled lists of small firms, like bakeries, arguing that they could abuse their dominant power in local markets. Small firms had sometimes to pay bribes to be lifted of these lists.[251] This is not an isolated case. There are countries with weak institutional development where competition law has been used to block major acquisitions from foreign firms or to protect domestic firms from foreign competition. In others, the law is simply not enforced, like countries where no merger has been effectively blocked, sometimes despite the best efforts of the competition authorities. This evidence shows that

[250] E. Glaeser, and A. Schleifer, "Legal origins", Quarterly Journal of Economics, 117(4) (2002) 1193-1294

[251] M. Boycko, A. Schleifer and R. Vishny, Privatizing Russia, MIT Press, 1995, page 54.

competition law should only be introduced above a certain level of institutional capacity, as our theory predicts.

Let us now translate the above model from the theory of torts to competition enforcement. We define, similarly, three regimes and indicate the main characteristics of the competition law enforcement that should fit the regime. Our starting point is that the same core of competition law should apply everywhere. The core should comprehend prohibition of cartels and monopolization or attempts to monopolize[252], and also include control of mergers that may have a significant impact on social welfare.[253] Merger control should prohibit mergers that impose a substantial lessening of competition. In most developing countries there are monopolies in infrastructure sectors, thus preventing abuses of dominance, regulating prices and ensuring open access becomes also essential.

In Regime I there is an environment of weak law and order. Doing nothing is superior to imposing legal and regulatory rules that would only elicit extortion at a higher social cost.[254] The implications for antitrust are quite clear: it is too early to adopt competition law.[255] What are the alternatives? First, emphasis should be put in building institutions for law and order, and there is no easy substitute for this requirement. Second, governments need to pursue general policies in order to build and improve competitive markets.[256] . Reduction of tariffs and in particular quantitative restrictions can increase competition in the tradable sector, by subjecting exportables and importables to a higher level of competition from international trade. Another important policy is to eliminate export and import monopolies that sometimes control the most important commodities in developing countries and

[252] Here the most serious practices are exclusionary price and non-price behavior by dominant firms. Vertical restraints by non-dominant firms could be dealt under a more sophisticated system.

[253] J. Fingleton, E. Fox, D. Neven and P. Seabright, Competition Policy and the Transformation of Central Europe, CEPR, 1995, present in chapter 3 a proposal for a minimum set of rules for a competition statute.

[254] However, we do not agree with Glaeser and Schleifer that laissez faire reduces extortion, because private groups may organize themselves and impose their own interests (rule of the strongest).

[255] Laffont was one of the first economists to call attention to the fact that a country should have a minimum level of development in order to introduce a competition authority. However, his reasoning is based on the scarcity of qualified personnel and the superiority of opening up to foreign trade. We have pointed out supra the limitations of such approach. See J. J. Laffont, Competition, information and development, Annual World Bank Conference on Development Economics, April, 20-21, 1998.

[256] The advice of international organizations is also very important, like showing the welfare enhancement impact of trade liberalization.

extract high rents. Sometimes the problem is excessive buyer power.[257] The main result from our model is that contextual competition policies and other policies to build competitive markets are crucial in Regime I and no competition law regime should be introduced before they reach a given level of effectiveness in the country[258]. Finally, international law and international institutions should be used to protect consumers of developing countries from international cartels.

A country should only introduce a competition statute if it is committed to building a competitive market economy. The level of such commitment is given by the policies pursued, like market development and infrastructure for market integration, openness of the economy to foreign competition, licensing and procurement systems that favor a competitive structure and create a minimum regulatory system. Business environment in terms of entry and exit and contractual laws need also to be in place.

Regime II corresponds to a lower intermediate level of institutional development where the country adopts a simplified system of law enforcement. The country may start by enacting a simplified competition law with low fines to avoid subversion and establish an independent Competition Authority.[259] High powered incentives, using less detailed information, are best as regulation of competition. One possibility is to use simple "per se rules" covering the following core areas: (a) prohibition of cartels, and (b) prohibition of refusals to supply by large firms, especially essential facilities.[260] Simultaneously, establish "bright lines" for merger control: high levels of turnover for merger notification and prohibition of mergers above a set of extreme

[257] In fact, we have witnessed lately the concentration in the distribution of the final goods (e.g. chocolate or coffee) and manufacturing in developed countries, leaving an ever lower value added in the production chain mainly to farmers in developing countries that are dispersed, confronting high transaction costs and costs of infrastructure. See the case study on cocoa beans in Part C in H. Qaqaya and G. Lipimile, ed., The effects of anti-competitive business practices on developing countries and their prospects for development, UNCTAD, 2008.

[258] This condition needs to be included in the criteria defined in the next section regarding institutional development.

[259] Sometimes governments are reluctant to delegate the required level of regulatory power to an independent authority. In that case a compromise may be to set-up a competition department in the ministry of economy.

[260] This is an area with very few consensus among jurists and economists. See E. Fox in (2007) Economic Development, Poverty and Antitrust, SW J. Law and Trade in Americas, 211. and P. Rey in Competition policy and economic development, mimeo. 1997, that address some of these issues. Rey defends that vertical restraints have a higher anticompetitive power in developing countries and capital market imperfections should lead also to a tougher approach to vertical mergers.

criteria.[261]. "Safe harbor rules" like legality of distribution agreements when "market share in the relevant market is below 30%" or no existence of dominance if "market share in the relevant market is below 30%" may be crude but they facilitate enforcement.

On broader competition policy issues, the country should also establish a competitive system for procurement with clear rules, supervised by a National Auditing Court. Also, based on the historical experience of the US in the Progressive Era, other regulatory legal systems are important for consumer protection. More important than antitrust and probably easier to implement is regulation of natural monopolies with high powered incentives (e.g. a price cap is preferable to cost based systems), as well as imposing interoperability and open access to infrastructures in basic infrastructures: telecommunications, electricity, gas, water, and transportation. Price regulation should avoid high infrastructure service prices. It also is very important to introduce regulation of the financial sector to avoid systemic problems like supervision of depository institutions, insurance and capital markets.[262]

Once the country has climbed up in the institutional development ladder to an upper middle level it enters into the first window of Regime III where it can attempt to resolve more disputes based on private litigation. The antitrust regime should, first of all, raise the amount of the fines up to an intermediate level. Leniency programs can start to play an important role.[263] Second, some of the simpler "per se" rules should give away to more sophisticated "rules of reason" in a number of provisions of the competition law. However, basic principles like "per se" prohibition of cartels and refusals of access to essential infrastructures should still be prohibited. However, "structured rules of reason" for predatory practices using prices[264] or non-price vertical restraints practiced by dominant firms should be introduced. The merger

[261] This criteria should depend on the market structures of the country and what are the major concerns about monopolization.

[262] Sometimes governments are tempted to introduce price regulation in any monopoly or quasi-monopoly markets. This is not a policy consistent with the functioning of a market economy. Except for cases of natural monopoly studied above, a superior policy would be to break-up the monopoly.

[263] Leniency programs are only effective when participants in the cartel have a benefit of avoiding the fine that compensates the cost of losing the cartel profits times the probability of getting caught. Only with the increase in fines (upheld by courts) and the increase in the probability of getting caught, which depends on the effectiveness of the enforcement system, it becomes effective. There is a kind of vicious circle.

[264] E.g., in the case of predatory pricing establish a simplified rule of exclusion, sacrifice and recoupment. Fidelity rebates and exclusivity clauses, like the black clauses in EU law, may be incorporated into the competition law of the country. For non-price exclusionary behavior it may be more difficult to define these rules.

control regime should move towards a more effects-based "lessening competition" approach, but still with some "bright lines" like a per se prohibition in extreme cases of concentration.

Finally, we arrive at the last window of Regime III, where the country has strengthened institutions in such a way that both the political, administrative and judicial systems are largely immune to extortions. In this case the country can introduce a mix of private litigation and administrative rule as the main instrument of law enforcement, with high fines for dissuading anti-competitive behavior. As the competition regime, and competition culture, becomes more widely accepted in society it is then time to introduce criminal sanctions.[265] In this regime, the economy can reap all the benefits of modern competition law enforcement. An independent Competition Authority, with appropriate human resources and a major profile among regulatory institutions, should be entrusted with prosecuting violations under administrative law, like the FTC or DoJ in the US or the Office of Fair Trading and Competition Commission in the UK.[266] The authority should be entrusted with enough investigative powers and be able to set high fines, enforcing them in real cases, when practices violate the law. The model of law to follow, at this high level of institutional development, will necessarily draw on the standard competition law of the US and the EU.

The best regime, for countries with this higher level of rule of law, is to combine administrative and private litigation systems. Private enforcement is also essential to redress damages between parties and to make antitrust more "democratic" and understood by citizens.

IV. Institutional development and criteria for establishing regimes of competition enforcement

What is the social infrastructure required to have a competition law? What are the levels of institutional development required to graduate a country for each of the 3 regimes presented above? Those are questions of major importance in designing a

[265] When criminal sanctions are introduced too early it can paralyze the judicial system. Courts are not yet fully knowledgeable about evidence and due process in competition law, and tend to apply penal procedures from criminal law, making it difficult to enforce competition law. In fact, according to our model, since criminal sanctions are considered harsher than fines, they should be introduced only in countries with high quality institutions.

[266] There are a number of efficiency reasons for having a unified competition authority subject to control by a specialized court, like Spain and France. This is also the model of the European Commission.

competition law regime, but they cannot be answered in abstract, and need a clinical analysis of each country. However, we can identify certain dimensions and scales in order to assess the country. Our assumption is that this is a reasonably working market economy (no central planning based or corporatist economy).

The social infrastructure required to establish a regime of competition law involves the following dimensions:

(i) A State and political system with a minimum functioning democratic regime, with a separation of powers and checks and balances among the three branches of the State, periodic general elections with political parties representing the spectrum of society and government with minimum quality. We distinguish three sub-dimensions:

i. State subject to checks and balances.

ii. Government policies that take into consideration social welfare and not dominated by vested interests.

iii. Political stability and peace and order. Otherwise an orderly economic activity would be impossible.

(ii) A public administration and a regulatory system with a minimum of efficiency, control (non-discretionary) and without a high level of corruption. This is required for the business environment to operate in terms of licensing, taxes and subsidies. Bureaucratic interferences and control of business activity should be fair and in the conduct of public interest.

(iii)Rule of law establishing the following institutions:

i. Protection of property rights. Required for a firm to operate in a market economy

ii. Contractual enforcement. All transactions in the market are based on formal or informal contracts.

iii. Judicial system with a minimum level of efficiency and being able to enforce i) and ii) with a minimum of predictability and

> in a timely process, respecting principles of due process. Obviously, the judicial system has to be complemented by a police and sanction system that is able to sustain order and carry out the decisions of the judicial system.

The first dimension of the social infrastructure is a general requisite for the functioning of a society and the basic system for the economy. A stable and peaceful environment is essential for the functioning of the economy. Although a democratic regime may not be a sine qua non for development, we think that the exceptions only confirm the rule that a democracy with the three branches of government and checks and balances among them are the basis of a well functioning market economy with rule of law[267]. It would be difficult to implement the other two dimensions of the social infrastructure without this constitutional basis on a sustainable basis.

Since antitrust law enforcement is only a part, and sometimes a small part, of the economic law, and also embedded in the regulatory framework, it requires a minimum of efficiency of the public administration and regulatory quality. One part of the law is usually enforced through administrative bodies and administrative law, so it is intrinsically part of the public administration. The other major role is played by courts, which control decisions of these administrative bodies and also by private litigation, so the judicial system also plays a major part in law enforcement.

In addition to the judicial system, the institutions of the rule of law that are central to the enforcement of competition law are property rights, which are the foundation of a market economy and contract enforcement that encompass formally or informally the majority of transactions.

No regime of competition law can be enforced without the involvement of the judicial system. Even decisions adopted by the competition authority should be subjected to control and appeal by courts. Private litigation also takes place in the court system. One of the most important institutions for the functioning of the antitrust law system is thus the type of judicial system. What criteria of development of the judicial system should be taken into account? The literature is still quite scarce.[268] An efficient judicial system is the set of laws, procedures and courts that delivers justice to citizens

[267] For a similar conclusion see, Dani Rodrik, One Economies- Many Recipes, Princeton Univ. press, 2007, at 51.

[268] See M. Trebilcock and R. Daniels, Rule of Law Reform and Development Charting the Fragile Path of Progress, Edward Elgar, 2008.

in a cost effective and timely manner. Djankov et al.[269] are among the economists to have studied the traits of judicial systems, but they do not touch on the question of outcomes and characteristics in the broader view that we require. In a survey conducted in 130 countries the authors study two types of cases: evicting a tenant and check collection. Based on the answers to the survey they build an index of formalism. One of the conclusions is that an increased rate of formalism leads to a lengthier process, but not necessarily to a better outcome (as perceived by survey respondents). Common law and Scandinavian law systems are more efficient in eviction and the German system in enforcement of credit contracts. Another interesting conclusion is that it is legal structure and not the level of development, which shapes judicial efficiency and that "bright lines" are more important when the judicial systems are weak and inefficient. Finally, because of the legal transplants that are so common nowadays, they caution that transplanting a given law system of a developed country to a country with weak institutional development (with "bad government") may lead to an inefficient judicial system.

We finally proceed to build an Index of Institutional Development required to identify the regime for the competition law structure and enforcement. Given the three dimensions of the social infrastructure identified above, we look for indicators in the large number of surveys already available under the Governance Project at the World Bank. To measure the level of government capture by corporations we take the Corporate Ethics Index [270] built by Daniel Kaufman and his collaborators, which is an average of the corporate legal and illegal corruption index. In he first dimension of the social infrastructure we include the Voice and Accountability Index of the Governance Matters database of the World Bank. The level of efficiency of the public administration is measured by an overall index of Control of Corruption. And the rule of law is measured by the Index of Judicial and Legal Effectiveness.

These four indicators are all taken for 2004 and then averaged to build the Index of Institutional Development. All indicators are scaled from 0 to 100% with 0 representing the worst and 100% the best institution.

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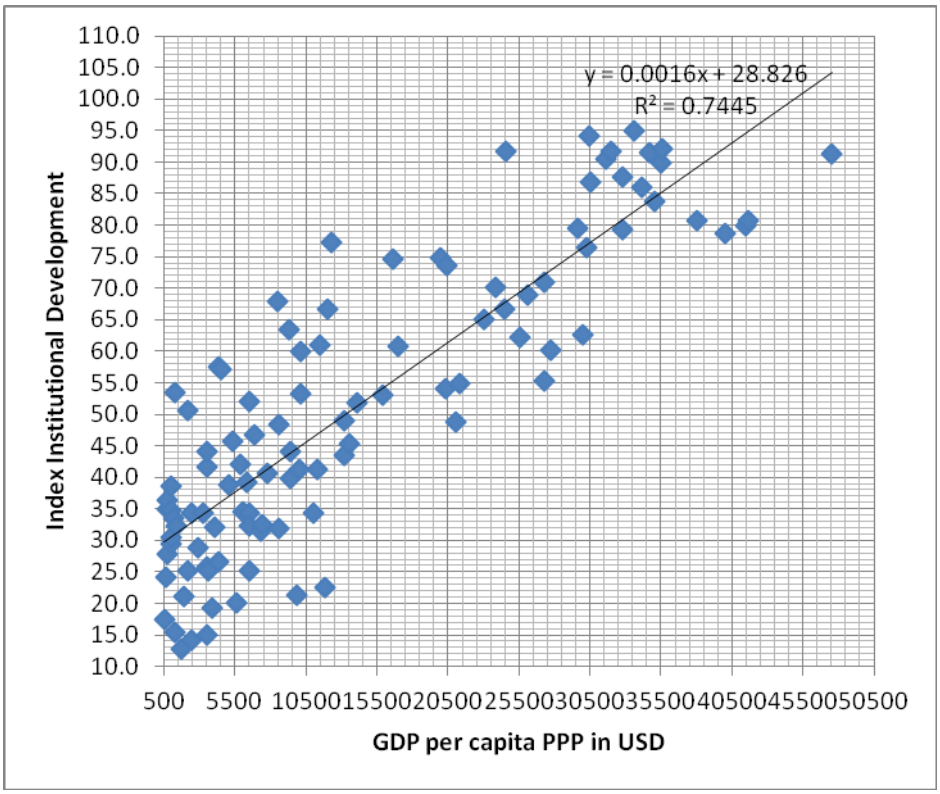
[269] S. Djankov, R. La Porta, F. Lopez-de-Silanes and A. Shleifer, "Courts", Quarterly Journal of Economics, 118(2) (2003) 453-517

[270] Table drawn from the Appendix to D. Kaufmann, "Corruption, Governance and Security: Challenges for the Rich Countries and the World", September, 2004, in Global Competitiveness Report 2004/2005, available at www.worldbank.org/wbi/governance/pubs/gcr2004.html

When plotted against the GDP per capita in Purchasing Power Parities the Index shows a high and positive correlation, although we do not try to identify any causality.



Source: Authors' computations. GDP per capita for 2005 from World Bank, Main Economic Indicators.

Ideally, we should use this Index to establish the regime of competition law and enforcement. However, it is not an easy task, since we do not have well specified clusters of countries. Thus, we need to use information about specific countries to define the cut-off points for each regime. These should be complemented in practice with a detailed clinical analysis of each country.[271]

The first group of countries corresponding to a full developed system of competition law, are a large part of the countries of the EU, as well as most of the OECD countries. They are all high income countries and have a GDP per capita above 20 000 USD, except for Estonia, Chile, Botswana and South Africa that have a lower income per capita but higher institutional development indices.

[271] In future research we are planning to also use indicators like the level of opening of the economy and dimension of the market economy for defining the context in which competition law regimes operate.

At the other end of the scale, are the countries in Regime I that have not yet the institutional level of development appropriate for an antitrust regime. Several EU countries are in Regime III but not in the highest level like Lithuania, Slovak Republic, Czech Republic, Italy and Greece. Further down are Romania and Bulgaria.

Notice that countries like Indonesia, Egypt and Peru have not yet the institutional development level, according to the above indicator, to adopt a fully blown regime of competition law. In fact, among the about 100 countries that have considered or already have a competition law, there are about 40 that still belong to regime I or are in transition to Regime II.

One final remark: Glaeser and Shleifer also draw important conclusions in terms of social policies in developing countries, in particular the importance of promoting a more equal income and wealth distribution. They point out that economic inequality exacerbates the problem of “inequality of weapons”, which has been central to the discussions of legal design. They also point out that growth in inequality, as observed in Russia in the 1990s is accompanied by deterioration of institutions, raising political demand for reform in order to improve law and order.

Togo

Introduction

Le Togo, pays de l'Afrique de l'Ouest, se présente sous forme d'un corridor relativement rectangulaire dont la largeur varie ente 50 et 150 kilomètres. Il est un pays membre de l'Union Economique et Monétaire Ouest Africaine (UEMOA) et de la Communauté Economique des Etats de l'Afrique de l'Ouest (CEDEAO). Sa population est estimée à 5 598 000 habitants en 2008. Le Togo couvre une superficie de 56 600 kilomètres carré. Ouvert sur le golfe de Guinée, le Togo fait frontalière avec le Ghana à l'Ouest, le Burkina Faso au Nord et le Bénin à l'Est. Le Togo a accédé à la souveraineté internationale le 27 avril 1960.

Le Togo éprouve un grand intérêt pour le renforcement et l'amélioration de sa position de place commerciale et de pays de transit en Afrique de l'Ouest. C'est dans cette perspective que le pays tient à servir de centre de relais aux importations et exportations des pays voisins et surtout des pays sans littoral. Tout ceci est facilité par le produit « Solidarité sur la Mer » qui sécurise le convoi des marchandises depuis le Port Autonome de Lomé vers d'autres pays destinataires.

Depuis les années 80, le Togo a acquis une réputation mondiale de carrefour d'affaires grâce surtout à son port en eau profonde, à la dynamique commerciale des femmes et au potentiel d'exportation du pays dans le domaine agricole et minier. La décennie suivante a été marquée par des tensions politiques et sociales. De ce fait, le secteur du commerce a connu des difficultés d'insertion dans le système commercial mondial.

Depuis 2006 et à la faveur de la Signature d'un accord entre le gouvernement, les partis politiques et des représentants de la société civile, le Togo s'est engagé dans un processus d'apaisement politique et de relance de l'économie.

Dans le cadre de sa politique générale de développement économique et sociale, le Togo pratique depuis de longues années une politique commerciale libérale.

Au fil des années et face aux contraintes de l'environnement économique et commercial national et international, le Togo a avec l'appui technique des partenaires comme l'Organisation Mondiale du Commerce (OMC), la Conférence des Nations Unies sur le Commerce et le Développement (CNUCED), le Fonds Monétaire International (FMI), la Banque Mondiale (BM) renforcé son option libérale par des mesures de suppression du commerce d'Etat sous monopole, la suppression des licences et autorisations d'importation, la suppression des licences d'exportation, des contingentements et des prohibitions.

C'est dans ce nouveau contexte économique libéral et pour une équité dans les activités commerciales au plan national, que le Togo a voté au cours de la deuxième législature la loi n° 99-011 du 28 décembre 1999 portant organisation de la concurrence.

Ces reformes constituent un vaste chantier sur lequel œuvre le Ministère du Commerce et de la Promotion du Secteur Privé à travers la Direction du Commerce Intérieur et de la Concurrence (DCIC), BP 383, Tél : 00228 221 27 84, Fax : 00228 221 05 72, LOME TOGO.

La mise en ouvre de la politique de concurrence a des conséquences positives dans le renforcement du développement économique. Des défis importants sont à surmonter pour faire de la concurrence un outil de promotion commerciale équitable et de développement.

La présente communication est structurée en quatre parties à savoir :

(i) Présentation de la loi n° 99-011 du 28 décembre 1999 portant organisation de la concurrence au Togo
(ii) Les effets de la politique de concurrence sur l'investissement ;
(iii) les conséquences sur les consommateurs
(iv) les défis de la mise en œuvre de la loi.

LA PRESENTATION DE LA LOI PORTANT ORGANISATION DE LA CONCURRENCE AU TOGO

La loi 011-99 portant organisation de la concurrence au Togo date de 1999 et comporte deux (02) titres, neuf (09) chapitres et soixante seize (76) articles.

Le *Titre I* traite de la liberté des prix et des règles applicables en matière de concurrence et le *titre II* est consacré aux pratiques illicites de la concurrence et de leurs sanctions.

Les prix des biens et services sont libres sur toute l'étendue du territoire et sont déterminés par le seul jeu de l'offre et de la demande (**Article 1er**). Toutefois des dispositions temporaires peuvent être adoptées contre des hausses excessives des prix lorsqu'une situation de crise, des circonstances exceptionnelles ou une situation anormale du marché dans un secteur économique donné les rendent nécessaires. La durée de ces mesures ne peut excéder six (6) mois conformément à la loi (**article 1 al 2 et article 2**).

Les règles relatives à la transparence du marché et des pratiques restrictives de la concurrence sont posées. A titre d'exemples, sont interdites :

- les ententes et les abus de domination **(Chapitre IV article 12, 14)** ;
- toute forme de prix imposé **(article 16)** ;
- toute revente de produit en l'état à un prix inférieur à son prix de revient **(article 17)** ;
- le refus de vente et la subordination de la vente d'un produit ou de toute prestation de service **(article 18)** ;
- des pratiques discriminatoires entre professionnels **(article 19) ;**
- des ventes sauvages et du para commercialisme **(article 20)** ;
- et la publicité mensongère ou trompeuse **(article 21)** etc …

En outre, toute pratique de faux et usage de faux **(article 22)**, toute tromperie et toute falsification portant sur les caractéristiques essentielles ou qualité substantielle des produits **(articles 24, 25 , 26 et 27)** est interdite.

Des règles relatives à la garantie du service après vente et de la sécurité du consommateur sont posées et punies par la loi.

Les sanctions sont constituées essentiellement de saisie, de suspension, d'amende et/ou de peines d'emprisonnement et sont applicables suivant qu'il s'agisse : (i) des infractions qualifiées de pratiques anticoncurrentielles ;(ii) des infractions aux règles de la transparence du marché et aux pratiques restrictives de la concurrence ;(iii) des infractions aux dispositions annexes à l'organisation de la concurrence ;(iv) et des sanctions diverses.

La loi prévoit au ***chapitre III*** l'institution de la commission nationale de la concurrence et de la consommation. Cette commission est un organe consultatif en matière de concurrence et de consommation. Cette commission a été installée en 2006, mais n'est pas opérationnelle faute de moyens logistiques et financiers.

CONSEQUENCES DE LA POLITIQUE DE CONCURRENCE SUR L'INVESTISSEMENT

L'activité commerciale est essentiellement caractérisée par la présence d'opérateurs économiques informels. Le droit et la politique de concurrence contribue à mettre en place des stratégies permettant d'amener les entreprises à passer du secteur informel au secteur formel et rentabiliser leurs affaires.

En termes d'avantages, cette politique permet ; (i) d'éviter l'évasion des recettes fiscales, (ii) la transparence et l'exactitude dans l'établissement des statistiques économiques.

En dehors de l'investissement des opérateurs nationaux, le pays a réalisé des scores dans le domaine des investissements directs étrangers. De plus en plus, il y a un engouement des opérateurs qui cherchent à se formaliser.

Il existe sur le marché intérieur aussi bien les togolais que les africains et les asiatiques (Libanais, les Pakistanais, Indiens, Chinois,...), les Européens (Français,

Anglais, Allemands, Italiens, Suédois, Belges etc…), les Américains, Brésiliens, Canadiens, Vénézuéliens, etc…

Une réglementation claire et rigoureuse et une bonne pratique de la politique de concurrence affaiblit la puissance des groupes d'intérêts et des groupes de pression commerciaux et financiers, combat les monopoles et les ententes et permet d'appliquer les meilleures pratiques internationales ce qui a des effets sur la situation des consommateurs et de lutter contre le phénomène de la vie chère. Elle contribue de cet fait à la promotion des investissements.

L'EXPERIENCE DU LIEN IMPORTANT EXISTANT ENTRE DROIT ET POLITIQUE DE LA CONCURRENCE ET LES INTERETS DES CONSOMMATEURS AU TOGO.

Les effets positifs du droit et de la politique de concurrence, sur les consommateurs n'est pas du reste. Dans la mise en œuvre de cette politique, le contrôle de prix des produits, biens et services a été supprimé. Les prix sont libres sur le marché et ne sont déterminés que par le seul jeu de l'offre et de la demande.

Pour assurer le respect des règles de la concurrence et éviter que des opérateurs économiques se livrent à des pratiques déloyales, des inspecteurs et contrôleurs de commerce procèdent à des enquêtes.

La qualité et le coût profitant aux consommateurs, la concurrence peut renforcer la compétitivité nationale et internationale des entreprises en les encourageant à fabriquer des produits de meilleure qualité, de façon plus efficace et à moindre coût.

Dans le domaine de la téléphonie mobile, trois opérateurs Togocel, Moov et Illico se partagent la marché togolais. Les consommateurs ont une marge de manœuvre pour choisir entre ces trois opérateurs en fonction des avantages présentés. Un autre opérateur de la téléphonie mobile est attendu.

Il en est de même dans le domaine du ciment de l'existence de trois usines de production à savoir CIMTOGO, FORTIA et DIAMOND CEMENT.

Dans le domaine de la communication, on variété d'opérateurs qui opèrent sur l'ensemble du territoire national. Il existe pour la presse écrite une parution pour l'Etat et une dizaine de parutions privées), la radio (deux radios publiques et une vingtaine de radios privées), la télévision (une télévision d'Etat et environ dix chaines de télévisions privées).

Tout ceci offre plusieurs variétés de choix de produits et de services à l'avantage du consommateur en termes de qualité et de prix.

A la lumière de tout ceci, des défis restent à lever pour une économie forte, compétitive et saine.

LES DEFIS DANS L'APPLICATION DE LA LOI SUR LA CONCURRENCE AU TOGO

Pour un commerce juste et équitable, la mise en œuvre efficace de la loi sur la concurrence est capitale. Cela passe nécessairement par la maîtrise des textes, le renforcement des capacités de tous les acteurs du commerce (Administration et secteur privé), l'encouragement de l'implantions d'autres opérateurs économiques dans tous les domaines d'activités économiques. Un autre défi reste l'harmonisation des textes sur la concurrence au plan national, régional et international. L'instauration d'autorités de concurrence plus fortes et la mise en place d'une Organisation Internationale sur la Concurrence. La concurrence est un instrument transversal qui est porteur de croissance et de développement et qui mérite une attention particulière au niveau national, régional et international.

CONCLUSION

Le cadre institutionnel et réglementaire de la concurrence existe au Togo et est opérationnel depuis 1999. La mise en œuvre de la politique de concurrence en faveur de la promotion du développement économique passe nécessairement par une intensification de la vulgarisation de la loi portant organisation de la concurrence, le

renforcement des capacités de l'autorité de concurrence en ressources humaines adéquates et en logistiques.

La culture de la concurrence n'est pas encore rentrée dans les habitudes des opérateurs économiques et des consommateurs. Il est nécessaire de vulgariser la loi à travers des ateliers de sensibilisations des acteurs sur la législation. Au-delà de la sensibilisation des acteurs, il s'impose comme une nécessité de renforcer les capacités des ressources humaines chargées de la mise en œuvre de la loi sur la concurrence. Le Togo pris isolément aura du mal à réunir les moyens pour lutter contre les pratiques anticoncurrentielles et faire la promotion économique. Voilà pourquoi le Togo œuvre aux côtés de ses homologues, membres de l'UEMOA, de la CEDEAO et des organisations internationales pour mener cette lutte pour l'instauration de la culture de la concurrence favorable à la croissance et au développement.

Le Togo invite donc tous les partenaires au développement, en tête desquels la CNUCED à assister le Togo afin que les besoins exprimés puissent trouver satisfaction pour enraciner la culture de la concurrence, faire la promotion de l'investissement, protéger les consommateurs et développer l'économie du Togo.

Turkey

What are the benefits of networking in the exchange of non-confidential information in facilitating cooperation?

Parallel to the process of globalization, the internationalization of competition law and policy has been gaining more ground. Countries around the world have embraced national, bilateral and/or multilateral approaches to deal with the internationalization of competition. However, none of these efforts have been successful to solve the dilemma of national laws versus cross-border anticompetitive practices conflict so far. Nevertheless, networking can be at least a starting point in addressing cross-border anticompetitive practices that harm consumers in different regional settings. Within this context, this contribution focuses on the networking experiences of the Turkish Competition Authority (TCA) initially from a bilateral perspective, while underscoring the agency's experience arising from multilateral formations especially within the framework of international organizations in the exchange of non-confidential information.

The TCA is the body responsible for antitrust in Turkey. Since its establishment in 1997, it is an independent agency in fulfilling its duties. In the field of antitrust, the Act no 4054 on the Protection of Competition is the main legislation in Turkey and it is considered to be in line with the EU *acquis*. The TCA has been trying to be an active player in the international relations arena from the very beginning. Besides the TCA is in the opinion that international cooperation, or in more strict sense *networking*, allows exchange of information and experience among the competition agencies, while offering – *limited*- opportunities for the implementation of competition rules against cross-border anti-competitive conduct. In the absence of global competition rules, networking can be a way to, say the least, exchange non-confidential information among the competition agencies around the world. In this context, networking can be carried out either through multilateral or bilateral instruments. On the multilateral fora, the TCA plays a part in international platforms like OECD, UNCTAD, and ICN. Nevertheless, the TCA also attaches great

importance to bilateral relations. In this vein, the TCA signed six Memorandum of Understandings (MOUs) so far with the competition agencies of Korea, Romania, Bulgaria, Portugal, Bosnia and Herzegovina, and Mongolia, while two more is on the way.

Indeed, the MOU journey of the TCA was started in 2005, while hosting the 5th UN Conference on Competition Policy in Antalya, when for the first time ever a Review Conference was held out of Geneva! The party to this very first MOU that the Turkey signed in the area of competition law and policy (CLP), was the Korea Fair Trade Commission (KFTC). This journey continued in 2005 with the Romanian Competition Council, in 2007 with the Bulgarian Commission on Protection of Competition, in 2008 with the Portuguese Competition Authority, and finally with the Council of Competition of Bosnia and Herzegovina and the Authority for Fair Competition and Consumer Protection of Mongolia during the 9th Annual Conference of the ICN in Istanbul in 2010. The TCA is currently holding negotiations with the competition agencies of other countries such as Croatia (Croatian Competition Agency) and Russia (Federal Antimonopoly Service).

The general characteristics of these MOUs can be summarized as follows:

- Voluntary in nature.
- Signed on the basis of mutual consent, willingness and determination of the parties.
- Cooperation in the field of CLP is the basic goal.
- Facilitates the exchange of non-confidential information between the parties.
- They are all soft cooperation instruments.
- They are formal yet practical and flexible in nature.
- They do not foresee any common enforcement mechanisms.

Based on the TCA's experiences, it is truism to argue that existence of – *even*- a soft agreement simplifies the communication in between the parties, and increases the knowledge about each other's enforcement and organizational structures. Parties can reach out at each other easily and rapidly (one knows whom to call or send a mail). This easiness and rapidity bring flexibility to the formal nature of the MOUs. They let

parties to follow what is going on in each other's jurisdiction, so that the results can be used to develop better practice. They can be even be used as a technical assistance mechanism as in the case of MOU signed with the Mongolian agency.

The TCA is periodically exchanging information with regards to latest developments in its legislation, cases and statistical data with the said agencies. This is indeed considered an experience sharing exercise at the TCA.

When networking and its role in the exchange of confidential information are being discussed, the practices of the TCA with the international organizations need to be mentioned. The work conducted at the OECD, UNCTAD and ICN platforms are in fact complementary to each other. Although the OECD is a club of developed nations and the developing countries emphasis is being felt at UNCTAD, these two organizations especially in the field of CLP are finding ways of interaction. On the other hand, the ICN is a focused network for antitrust agencies from developed and developing countries that communicate regularly with both of them. All these platforms hold the competition world together by motivating officials from different countries to work together.

Among these formations, the ICN is unique as it is the only international body devoted exclusively to competition law enforcement and needs special emphasis. The basic aim of this network is to address practical antitrust enforcement and policy issues of common concern. Member agencies produce work products through their involvement in flexible project-oriented and results-based working groups that enhances the dialogue and understanding among countries that adopted different approaches. It is a very flexible organization without any formal structure. Working group members communicate and coordinate their activities together via internet, telephone, fax and videoconference most of the time. This virtual network puts away the formalities among the officials of all member agencies around the world. It increases communication and awareness with respect to various countries' enforcement, legislation, organization, etc. Having said that, the TCA, based on its experiences, believes that the benefits from the exchange of non-confidential information are enormous thanks to all these bilateral and international efforts which ultimately facilitate cooperation.

Zimbabwe

Introduction

The role that competition policy plays, and can play, in promoting economic development is of immense and crucial importance to developing countries, particularly those which have already adopted competition policies and laws, as well

as those which are seriously contemplating of adopting such policies and laws. This paper discusses that role in the context of the Zimbabwean experience. The paper will first examine and discuss the two concepts of 'competition policy' and 'economic development' with a view to identifying their common elements. It will then analysis the interplay between the two concepts, before looking at the Zimbabwean experience.

Economic Development and Competition Policy Defined

Economic development has been defined as "the increase in the standard of living in a nation's population with sustained growth from a simple, low-income economy to a modern, high-income economy – its scope includes the process and policies by which a nation improves the economic, political and social well-being of its people"[272].

According to Peter's Business and Economy Issues (2006) [273] , "economic development refers to a sustainable increase in living standards – it implies increased per capita increase, better education and health, as well as environmental protection". In the Issues, public policy on economic development is explained as in Box 1:

Box 1: Public Policy on Economic Development

Public policy generally aims at continuous and sustained economic growth and expansion of national economies so that 'developing countries' become 'developed countries'. The economic development process supposes that legal and institutional

[272] http://en.wikipedia.org/wiki/Economic_development
[273] December 20th, 2006 under Economic theory, 'Definition of Economic Development'.

adjustments are made to give incentives for innovation and for investments so as to develop an efficient production and distribution system for goods and services.

Economic development has evolved into a professional industry of highly specialised practitioners normally working in public-private partnerships that are sanctioned and many times at least partially funded by local, regional and state/provincial tax dollars. These economic development corporations function as individual entities and in some cases as departments of local governments. Their role is to seek out new economic opportunities and retain their existing business wealth. There is intense competition between communities, states and nations for new economic projects. The creation and retention struggle is further intensified by the use of many variations of economic incentives to the potential business. These incentives vary greatly and can be highly controversial. The measurement of success with this industry is normally job creation, economic growth and increased or retained tax base.

Economic development in its simplest form is the creation of wealth for all citizens within the diverse layers of society so that all people have access to potentially increased quality of life. Job creation, economic output and increase in taxable bases are the most common measurement tools.

The term 'competition' as an act or process of competing has been defined as "the effort of two or more parties acting independently to secure the business of a third party by offering the most favourable terms"[274]. Competition is thus the process by which sellers strive to gain the patronage of buyers. Sellers are more likely to attract and retain buyers if the quality of their goods or services is higher, and the prices of the goods or services are lower, than those of their rivals, or if they are innovative in their production processes and marketing techniques.

According to Fourie and Smit (1999)[275], there are a number of different uses, definitions and concepts of the term 'competition' depending on who one is and for

[274] Merriam-Webster Dictionary.

[275] Frederick C.v.N. Fourie & Minette Smit, *Industrial Economics for Competition Policy,* lecture delivered at the Competition Policy and Law Inaugural Southern Africa Course, organised by the Competition Commission of South Africa and held in Pretoria, South Africa, during the period 14-25 June 1999.

what purpose one wants to use the definition for. The ordinary consumer view of competition is that of rivalry between contestants, as in sport. Under this view, there is a winner, and someone "gets the bone". This view is sometimes referred to as the intuitive view. The typical business person's view of competition is similar to the intuitive view of rivalry, but with more intense challenges of trying to gain an advantage over other competitors. Competition is taken as a process whereby firms strive against each other to secure custom for their products, i.e., it represents the active rivalry of firms for customers: thus the nature of competition is such that enterprises compete to out-smart their competitors[276].

The Organisation for Economic Co-operation and Development (OECD) in its *Glossary of Industrial Organisation Economics, Competition Law and Policy Terms*[277] provided a comprehensive definition of competition, which is stated in Box 2.

Box 2: OECD Definition of Competition

Competition is a situation in a market in which firms or sellers independently strive for the patronage of buyers in order to achieve a particular business objective, e.g., profits, sales and/or market share. Competition in this context is often equated with rivalry. Competitive rivalry between firms can occur when there are two firms or many firms. This rivalry may take place in terms of price, quality, service or combinations of these and other factors which customers may value.

Competition is viewed as an important process by which firms are forced to become efficient and offer greater choice of products and services at lower prices. It gives rise to increased consumer welfare and allocative efficiency. It includes the concept of 'dynamic efficiency' by which firms engage in innovation and foster technological change and progress.

[276] CUTS Monograph on Investment and Competition Policy #6, *All About Competition Policy & Law For the Advance Learner,* CUTS Cente for International Trade, Economics & Environment, Jaipur, 2000

[277] R.S. Khemani and D.M. Shapiro, *Glossary of Industrial Organisation Economics, Competition Law and Policy Terms,* Organisation for Economic Cooperation and Development (OECD), Paris, 1991.

Source: OECD Glossary of Industrial Organisation Economics, Competition Law and Policy Terms

Vigorous competition between firms is the lifeblood of strong and effective markets. Competition helps consumers to get a good deal. It encourages firms to innovate by reducing slack, putting downward pressure on costs, and providing incentives for the efficient organisation of production. When working effectively, competition involves a process of rivalry between firms that strive to win customers' business by achieving the lowest level of costs and prices, developing new products or services or exploiting particular strengths, skills or other advantages to meet customer needs more efficiently and effectively than competitors.

Competition thus forces firms to become efficient and to offer a greater choice of goods and services at lower prices. In a competitive market economy, price signals tend to be free of distortions and create incentives for firms to redeploy resources from lower to higher-valued uses. The benefits that flow from competition therefore include increased economic efficiency, innovation, and consumer welfare. Economic efficiency generated by competition includes both 'productive' efficiency (i.e., producing without waste) and 'allocative' efficiency (i.e., producing the goods and services that society values most highly).

It has however been found that firms have natural inclinations to acquire market power, that is, to obtain discretionary control over prices and other related factors determining business transactions. Such market power may be gained by limiting competition through: (i) the erection of barriers to commerce; (ii) the conclusion of collusive agreements and arrangements to restrict output and increase prices; and (iii) the engagement in other anti-competitive business practices. This imperfect competition is generally viewed as market failure that results in inefficient allocation of resources, and adversely affect industry performance and economic welfare. Such market failures enable sellers to deliberately reduce output and charge higher prices at the expense of consumers and society in general, hence the need for regulation in the form of competition policy and law.

The term competition policy is used to cover policies adopted by governments to address the anti-competitive behaviour of enterprises, whether private or public[278], and to influence competition in markets. Competition policy is therefore a regulatory tool that is employed by governments to address market failures caused by engagement by firms in restrictive business practices by maintaining or creating a foundation for effective functioning of markets. In this connection, the effective implementation of competition policy requires appropriate legislation that gives the policy legal force and the establishment of regulatory authorities to enforce the law and ensure a level playing fields for all competing firms in order to stimulate efficiency and to protect consumers. Competition law, on the other hand and as implied in the foregoing, is a set of rules that firms must follow in ensuring that the market does not fail from anti-competitive practices. The use of competition law reflects a country's wish to harness the power and efficiency of the market mechanism. This power can be blunted or lost if firms can avoid competing with each other by colluding, or if firms in dominant positions abuse their dominance by preventing competition. Competition law is therefore a sub-set of competition policy since it is the legal framework that gives effect to that policy.

As stated by CUTS International (2000)[279], the main objective of competition policy is to preserve and promote competition as a tool to ensure efficient allocation of resources in an economy. This would result in the maximisation of real income of the economy. Further, from the consumers' perspective, it would result in the best possible choice of quality, reasonable prices and adequate supplies. The pursuit of these objectives would lead to controlling the concentration of economic power, encouraging innovation, protecting and promoting social welfare and in particular the interests of consumers.

The World Trade Organisation (WTO) summarised some socio-economic objectives of competition law, as listed in Box 3.

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[278] As observed by Vinod Rege in his presentation on 'Trade and Competition Policy Issues Facing Commonwealth Developing Countries' at the Commonwealth Working Group Meeting on Trade, Competition Policy and Law, held in London, United Kingdom, on 25 July 2000.

[279] CUTS Monograph on Investment and Competition Policy #6, *All About Competition Policy & Law For the Advanced Learner,* CUTS Centre for International Trade, Economics & Environment, Jaipur, 2000.

Box 3: WTO List of Some Socio-Economic Objectives of Competition Law

- Protecting consumers from the undue exercise of market power.
- Promoting economic efficiency, in both a static and dynamic sense.
- Promoting trade and integration within and economic union of free trade.
- Facilitating economic liberalisation, including privatisation, deregulation and the reduction of internal trade barriers.
- Preserving and promoting the sound development of a market economy.
- Promoting democratic values, such as economic pluralism and the dispersion of socio-economic power.
- Ensuring fairness and equity in market place transactions.
- Protecting the 'public interest', including considerations relating to industrial competitiveness and employment.
- Minimising the need for more intrusive forms of regulation or political interference in a free market economy.
- Protecting opportunities for small and medium-sized businesses.

Source: Annual Report of the WTO Secretariat, 1997

There is however no unique concept of 'competition policy' since it varies across different countries depending on their varying socio-economic needs. As noted in a 2000 Commonwealth Secretariat paper on '*Comparative Analysis of Competition Law and Policy in the Commonwealth*'[280], the term 'competition policy' is used in different contexts in different countries, and "can be defined to include all policies relevant to competition in the market, including trade policies, regulatory policies, and policies adopted by governments to address anti-competitive activities of enterprise, whether private or public". Since competition in general allows the market to reward good performance and to penalise poor performance by producers, it encourages entrepreneurial activity and market entry by new firms. It also provides a stimulus for

[280] Discussion Paper presented to the Commonwealth Working Group Meeting on Trade, Competition Policy and Law, held in London, United Kingdom, on 25 July 2000.

enterprises to become more efficient and to produce a wider choice of quality goods and services at lower prices.

Anti-competitive practices that are generally addressed and proscribed in many countries' competition policies and laws include the following:

- Horizontal restraints (i.e., arrangements between competitors to restrain competition, including price fixing, restraint of output, market allocation, collusive tendering, and conscious parallelism, that is competing suppliers generally setting the same prices but without an explicit agreement);
- Vertical restraints (i.e., anti-competitive arrangements between firms along the production-distribution chain, including exclusive dealing, reciprocal exclusivity, refusal to deal, discriminatory pricing, and territorial restraints);
- Abuse of dominant position (practices undertaken by a single firm when that firm enjoys a dominant or monopoly position);
- Anti-competitive mergers and acquisitions.

Given socio-economic objectives of competition policy, its interface with other public economic policies is unavoidable and desirable. As stated by Khemani (1999)[281], the list of microindustrial government policies that can support or adversely impinge of the application of competition policy would include: (i) trade policy, including tariffs, quotas, subsidies, antidumping actions, domestic content regulations, and export restraints; (ii) industrial policy; (iii) regional development policy; (iv) intellectual property policy; (v) privatisation and regulatory reforms; (vi) science and technology policy; (vii) investment and tax policies; and (viii) licences for trades and professions. In noting the economic importance of competition policy Khemani concluded that "indeed, the case can be made that competition policy should be viewed as the fourth cornerstone of government economic framework policies along with monetary, fiscal, and trade policies".

Interplay between Competition Policy and Economic Development

[281] R. Shyam Khemani, 'Objectives of Competition Policy', in *A Framework for the Design and Implementation of Competition Law and Policy*, The World Bank, Washington D.C., and Organisation for Economic Co-operation and Development (OECD), Paris, 1999.

Given the above definitions and objectives of economic development and competition policy, the common feature of the two concepts is socio-economic well-being through productive and allocative efficiencies. In the interplay between competition policy and economic development, an effective and robust implementation of competition policy should lead, or contribute, to economic development. It can therefore be said that competition is a process that fosters effective use or efficient allocation of resources, and therefore leads to economic development.

In developing countries, therefore, the implementation of competition policy and law must be specifically geared towards economic development. For example, the competition authorities' determinations on mergers and acquisitions should be aimed at not only addressing the identified competition concerns, but also at advancing other benefits of a public interest nature, such as employment creation and retention, export earnings and competitiveness, protection of small and medium-sized enterprises, etc. The prescriptive approach in classifying mergers as to their effects on competition for the purposes of declaring certain mergers as being fundamentally harmless to competition should be taken with extreme caution. While it has been prescribed in some jurisdictions that only horizontal mergers should be cause for concern, vertical and even conglomerate mergers have raised serious competition concerns in developing countries. Since vertical mergers combine undertakings at different stages in the production and distribution process, they may have harmful effects on competition if they give rise to risk of markets becoming foreclosed to competitors, if they lead to the creation and maintenance of collective dominance over the relevant markets. Conglomerate mergers can also be anti-competitive if they are considered in the context of additional financial strength they give to the parties involved, which the parties can use against actual or potential competitors in their combined markets through cross-subsidisation (the "deep pockets" concept).

Developing countries should however also take into account the fact that the reasons why firms merge are many and diverse most mergers pose little or no serious threat to competition, and may actually be pro-competitive. Such benevolent mergers have a number of economic advantages, such as resultant economies of scale, reduction in the cost of production and sale, and gains of horizontal integration. There could also

be more convenient and reliable supply of input materials and reduction of overheads. The process towards economic development could therefore be hampered or frustrated if such mergers and acquisitions are outrightly rejected by competition authorities by the mere fact that they do not pass the lessening of competition or dominance test. The economic development process would however be enhanced if the mergers are approved with conditions aimed at eliminating or minimising their identified competition concerns and at promoting other public interests.

The wholesome adoption of the prescriptive approach in the consideration of restrictive business practices (RBPs) should also be avoided for the purposes of economic development. Certain RBPs have been prescribed as being *per se* prohibited. Such practices include price-fixing arrangements, market-sharing arrangements, collusive tendering, and even resale sales maintenance. While international hardcore cartels at price fixing should be outrightly prohibited because of their huge economic costs, some domestic price-fixing arrangements have certain efficiency elements that are aimed at protecting the consumer from over-pricing by unscrupulous professional firms (e.g., law and health firms, etc.), or *bona fide* intended solely to improve standards of quality or service in regard to the production or distribution of the commodity or service concerned. Before outrightly prohibiting such arrangements, their underlying causes should be thoroughly investigated for possible rectification. For example in a case involving a price-fixing bread 'cartel' the root cause might not be the intention to overcharge the consumer but the existence of an oligopolistic market structure that encourages conscious parallelism, or price leadership. The appropriate remedy in such a case would be to encourage the entrance of smaller bread making enterprises, with lower operational costs, to compete with the existing larger firms to induce price competition.

The Zimbabwean Experience

Zimbabwe formally adopted competition policy and law in 1996 with the enactment of the Competition Act, 1996 (Act No.7 of 1996). The Act however only came into force in 1998, the same year that its implementation authority, the Industry and Trade

Competition Commission (ITCC)[282], was established. In adopting competition policy and law, Zimbabwe became the fifth country in Southern and Eastern Africa to do so after South Africa, Kenya, Tanzania and Zambia.

Even though competition policy and law was only formally adopted in Zimbabwe in 1996, the Government of Zimbabwe had always been wary of monopolies and oligopolies that engaged in restrictive practices and exercise market power to the detriment of economic development. The monopolies and oligopolies were controlled by the Government through the use of various policies and mechanisms, such as: (i) price controls (which were extensively used to limit the ability of firms in monopoly or dominant positions to charge consumers high monopoly prices); (ii) the fixing of minimum wages (which was done through labour regulations to prevent big businesses from exploiting the workers); (iii) the foreign exchange allocation mechanism (which was meant to preserve and ensure best use of scarce foreign exchange, but informally used as leverage as leverage against business practices felt to be exploitative); and (iv) the creation of parastatal organisations in the industrial and commercial sectors (to counter and limit the ability of private monopolies and oligopolies to abuse their dominant positions).

While the issue of restrictive business practices (RBPs) in Zimbabwe had always been of great concern to the Government, there was also growing concern within the business community that there was lack of competition in Zimbabwe domestically and that the country's industries were not competitive internationally. The need for a formal competition policy was heightened by Zimbabwe's adoption in 1992 of an IMF-sponsored Economic Structural Adjustment Programme (ESAP), which called for the establishment of a "Monopolies Commission" to monitor competitiveness and regulate RBPs in the economy.

Zimbabwe's competition policy and law cover anti-competitive agreements (of both a horizontal and vertical nature), abuse of dominance (or monopolisation) and anti-competitive mergers and acquisitions. Anti-competitive practices that are prohibited in the Competition Act include the following:

[282] The name of the Commission was subsequently changed to the Competition and Tariff Commission in 2001 following the merger of the ITCC and the former Tariff Commission.

Per Se Prohibited Practices	'Rule of Reason' Prohibited Practices
• Collusive arrangements between competitors (price-fixing and market-sharing arrangements) • Bid-rigging • Predatory pricing • Resale price maintenance • Exclusive dealing.	• Tied or conditional selling • Discriminatory pricing • Excessive pricing • Tie-in sales • Quantity forcing

The Act also prohibits a number of unfair consumer practices, such as misleading advertising, false bargains, distribution of commodities or services above advertised price, and undue refusal to distribute commodities or services.

Since the effective commencement of its operations in 1999, the competition authority of Zimbabwe has handled over 1 000 competition cases, involving both restrictive and unfair business practices (about 53%% of the total cases handled) and mergers and acquisitions (47%).

A study that was undertaken by the Commission in 2006[283] showed that the mergers that were approved by the Commission with or without conditions during the period 1999 to 2005 resulted in immense benefits to both the merging parties and the national economy as a whole. Apart from normal competition benefits (such as the elimination of monopoly situations, the prevention of market exits, and the removal of vertical restraints), other economic benefits of a public interest nature that were realised from the mergers included: (i) employment creation and/or retention; (ii) increased export earnings; (iii) continued availability of goods and services on the

[283] *Report on Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe: Part I,* Competition and Tariff Commission, Harare, Zimbabwe, November 2006

domestic market; (iv) indigenisation or localisation of control of economic activities; and (v) promotion of foreign direct investment.

Box 4 shows the extract of the study report on the socio-economic impact of the *Rothmans of Pall Mall/ British American Tobacco Zimbabwe merger* that was one of the very first mergers examined by the Commission following its effective coming into operations in 1999.

Box 4: Socio-Economic Impact of the Rothmans of Pall Mall/ British American Tobacco Zimbabwe Merger

Outline of Transaction (a)

In January 1999, British American Tobacco Plc of the United Kingdom announced that it had reached an agreement with the main shareholders of Rothmans International, Compagnie Financiere Richemont AG of Switzerland and Rembrandt Group Limited of South Africa, to merge their international tobacco businesses. Subsequent to the completion of the international merger, Rothmans of Pall Mall (Zimbabwe) Limited in September 1999 applied to the Commission in terms of section 35 of the Competition Act, 1996 for authorisation to acquire the entire issued share capital of British American Tobacco Zimbabwe Limited (BAT Zimbabwe). Even though Rothmans of Pall Mall (Zimbabwe) Limited was the acquiring party, the merged entity was to be named British American Tobacco (Zimbabwe) Limited.

The analysis of the relevant market revealed that the two merging parties were the only players in the manufacture of cigarettes in Zimbabwe, and a monopoly situation was therefore going to be created by the merger. It was also submitted and proved that the market was failing to contain two large cigarette companies, and that the target firm, BAT Zimbabwe, was facing closure. It therefore seemed likely that a

monopoly situation was going to result whether or not the merger was authorised. However, some benefits that could be obtained if the merger were authorised were also found. Closure of BAT Zimbabwe would result in the disappearance of certain popular cigarette brands that were being manufactured by that company, such as the *Kingsgate* and the *Berkeley* brands. It was also established that entry barriers into the cigarette manufacturing industry were formidable and would not allow early and timely entry. It was also established that the two merging parties had a long history of cooperation in the manufacture and distribution of cigarettes, implying that competition between them was not intense even before the merger. The monopoly was also perceived, through the attainment of economies of scale, to result in efficient use of resources and to also result in stability of prices.

The Commission therefore approved the merger with the following conditions aimed at alleviating the possible adverse effects of the monopoly situation to be created:

- all the identified surplus cigarette making equipment at the BAT premises in Harare should be disposed of at fair and realistic prices to third parties interested in entering the cigarette making industry within a reasonable period of time; and
- upon consummation of the merger, the ex-factory price of all the cigarette brands being produced by the merging parties should not be higher than those charged immediately prior to the merger, with any future price increases being justified to the Commission before implementation as long as the monopoly situation created in the cigarette manufacturing industry remained in existence.

(b) Stakeholder Views and Comments

(i) Cut Rag Processors (Pvt) Limited

Cut Rag Processors was formed in February 2000 for the production and manufacture of both cut rag and cigarettes for the export and local markets. Cigarette production at the facility began in June 2001 with the manufacture of the *Remington Gold* brand of cigarettes. Following the merger of BAT Zimbabwe and Rothmans Zimbabwe, Stable

Enterprises (t/a Essenside Enterprises), one of the shareholders of Cut Rag Processors, bought a cigarette maker and a processor from BAT as conditioned by the Commission. Cut Rag Processors has since grown into a big organisation. The cigarette maker bought from BAT was a Mark 8 model, which could only produce about 1 800 cigarettes per minute. The company now has three more such machines, and in addition has also bought three Mark 9 machines, which can produce about 4 500 cigarettes per minute. The production capacity for Cut Rag Processors has gone up by more than twenty times since 2001.

Cut Rag Processors' business is basically the manufacture of cigarettes for local and export market, as well as the contract manufacture of cigarettes for other players outside the country, and the manufacture of cut rag for own use and for other cigarette manufacturers. The company was granted an Export Processing Zone (EPZ) free Port licence in November 2000 and abides by the EPZ regulations that require that each licensed company should export at least 80% of production. It produces about 120 million cigarettes per month, of which about 10 million would be for the local market. The company now employs about 294 employees at the maximum, given that there are contract workers who are seasonally employed. There are two other players who have since entered the market. These are Breko International and Savanna Tobacco Company (Pvt) Limited, and both also have EPZ status.

Cut Rag Processors owes its success to the equipment bought from BAT, and as such the merger went a long way in removing a monopoly situation in the cigarette manufacturing industry.

(ii) British American Tobacco Zimbabwe Limited

Whilst the merger yielded certain benefits in terms of increased efficiencies and economies of scale, the manner in which some of the benefits that may have been anticipated at the time of the merger have eventually materialised may not have been as predicted at the time of the merger, as the business has, over time, had to respond to the vagaries of the changing macro-economic landscape to sustain its viability.

Regarding anticipated benefits of the merger, there has been improved asset utilisation

and attainment of economies of scale. The merger has resulted in increased production efficiency in that: (i) all the production is now being done from one plant and one location as opposed to two, pre-merger, and this has resulted in increased production efficiency and machine utilisation; (ii) procurement efficiencies were also obtained by consolidating the requirements for the group and obtaining a leveraging advantage; and (iii) additional supply-chain efficiencies were obtained by BAT brands tapping into the existing Rothmans' distribution system.

The merger has however not resulted in the creation of more permanent employment as the merged company has had to undergo staff rationalisations in efforts to further cut costs in response to pressures from the operating environment. The first such rationalisation took place in the year 2000 immediately after the merger through the retrenchment of those individuals who were not absorbed into the merged company. This was necessary to avoid certain duplications of roles. It should be noted that in the context of the increasing pressures of the macro-economic environment, the merged company was not alone in adopting such a strategy in order to reduce costs. The merged company continues to consider relevant and effective approaches to reducing operational costs through such initiatives as the outsourcing of certain functions. The overall level of employment was higher in pre-merger Rothmans than in pre-merger BAT Zimbabwe. Immediately after the merger, in order to maximise efficiencies and reduce duplications of roles, the headcount evened out to an average between the two sets of headcounts as the payroll merged. This approximate pattern was sustained over the years from 2001 to 2003. 2004 saw the beginnings of a drop in overall headcount as the company began to implement the necessary rationalisation and merging of resources to further improve on efficiencies and reduce costs. As at 2006, the overall headcount for the merged company is at its lowest levels since the merger. In terms of trends in respect of contract and permanent employees, the proportions have remained consistent, with the greater number of employees in permanent positions than in contract positions.

BAT Zimbabwe does not manufacture or produce any international brands so it does not, as a local company in its own right, compete internationally. The merger took place between BAT and Rothmans internationally as well as locally. This contributed to consolidating the global BAT group's position as the second largest manufacturer

and producer of cigarettes in the world. BAT's international competitors include Phillip Morris International, Japan Tobacco International and Imperial Tobacco International.

At the time of the merger, it was proposed that the merged company's brand portfolio would include: *Madison, Kingsgate, Newbury, Everest* and *Berkeley*. Today, each of the abovementioned brands remains a part of the existing brand portfolio that is manufactured for the local market. In addition, although international brands (Dunhill) have at some time been part of this portfolio, the international brands are no longer available for sale locally because of foreign currency constraints. Priority has been given to importing raw and wrapping materials for manufacturing local brands. Although it was intended that the merged company was to be the largest manufacturer and marketer of cigarette and tobacco products in Zimbabwe, the market has seen the emergence of a number of new local competitors, mainly focusing on the export market. These include Cut Rag, Savanna, Breko and Africa Tobacco. The merger has not, therefore, resulted in there being a monopoly in the market. Current local competition is as follows:

BAT Zimbabwe	93.4%
Savanna	1.6%
Cut Rag	1.4%
Breko	1.5%
Others (Africa Tobacco)	2.1%
Total	**100%**

(c) Effectiveness of the Conditions

The first condition, which required the merging parties to dispose of equipment owned by BAT, was intended to induce new entrance into the industry. The disposal was done and the winner of the tender was Essenside Enterprises trading as Stable Enterprises. Cut Rag Processors, for which Stable Enterprises is a shareholder, was formed in 2000 and production began in June 2001 using the equipment that had been bought from BAT as part of the conditions. Cut Rag Processors has grown over time

and is now a strong competitor of the merged British American Tobacco. Two other players, Breko International and Savanna Tobacco, have since entered the market.

Cut Rag Processors is the producer of the *Remington Gold* and *Oxford* cigarette brands. These brands are in four variations, the Virginia Blend, the American Toasted, the Light and the Menthol. Moreover, the company employs about 294 employees and produces about 120 million cigarettes per month, with 10 million being for the local market. Cut Rag Processors also manufactures its own cut rag as well as making contract cut rag and cigarette manufacturing for other players out of the country. Cut Rag Processors acknowledges that it owes all its success to the equipment that was bought from BAT, which managed to act as a springboard for diversification.

The above showed the extent to which the condition imposed by the Commission went in promoting competition through the elimination of a monopoly situation. It was only recently that there were two new entrants, for over two years, there was formidable competition between BAT and Cut Rag Processors, to the extent that BAT complained to the Commission that Cut Rag Processors were using a health warning clause that was not to the Ministry of Health specification. Cut Rag Processors also counter-complained that BAT was trying to drive it out of business by encouraging retailers to remove their new cigarette brand from the market. Thus the condition was successful in inducing competition in the industry after the merger.

The second condition was that the prices the monopoly charged were to be tightly monitored until such a time when there was no monopoly situation, that is, until there was new entrance into the industry. This price monitoring helped in ensuring that no excessive pricing was done, since the parties were requested to notify price increases in advance and give justifications to the Commission, which weighed them against the margins of increase. Through this process, the Commission protected the consumers against any unjustifiable and excessive price increases by the monopoly. Thus, the condition was effective in controlling abuse of position by the merged entity.

(d) Realisation of Perceived Benefits

The *Rothmans/ BAT merger* was perceived to bring the following benefits: (i) the

continued existence of the cigarette brands that were being manufactured by British American Tobacco (Zimbabwe) Limited such as the Kingsgate and the Berkeley brands in their different dimensions, which commanded 30% share of the market, in an environment where there were no close substitutes; (ii) the attainment of economies of scale, resulting in efficient use of resources and in stability of prices and improved international competitiveness, leading to improvement in exports; and (iii) improved asset utilisation that would create more permanent employment.

The merger ensured the continuation of cigarette brands that were being made and supplied by BAT Zimbabwe and whose production was now in limbo. Both the *Kingsgate* and *Berkeley* cigarette brands are still in the market, and are still some of the favourite brands of the majority of the smoking consumers. Attainment of economies of scale in production as evidenced by increased production efficiencies and machine utilisation due to the use of one plant for the two companies can also be argued to have materialised. The stability of prices is however very questionable and an area which is difficult to prove under the environment of hyperinflation. It therefore follows that benefits (i) and (ii) above that were anticipated were realised.

It is largely the failure of the realisation of (iii) above that has culminated into some negative consequences from the merger. One of the perceived positive aspects of the merger was that the merger was in the interest of the public, as it would create more stable long-term employment benefits. It however turned out that about 4061 employees, for both managerial and non-managerial employees lost their jobs as a direct result of the merger. The mostly affected were the permanent non-managerial employees, despite the fact that the merger was anticipated to bring "more permanent" employment. The parties feel that this was necessary as it was aimed at avoiding duplication of effort, implying that the possibility was known by the parties beforehand. The table below shows the immediate impact of the merger on employment between 1999 and 2000.

	Pre-Merger (1999)	Post-Merger (2000)	Retrenched
Total Employees	8 389	4 328	4 061

Contract Employees	2 225	2 062	163
Non-managerial Employees	5 400	1 757	3 643
Managerial Employees	764	509	255

Some of the other conditionally-approved mergers that generated substantial socio-economic benefits included the following:

- *BP Zimbabwe/Castrol Zimbabwe merger* (increased production efficiency and machine utilisation).
- *Zimboard/PG Bison merger* (restoration of plant productivity, increased production efficiency and machine utilisation, improvement in product quality, effective turnaround from operating loss to operating profit, increased export earnings, promotion of foreign direct investment).
- *Unicem/Pretoria Portland Cement merger* (restoration of plant productivity, increased competence and maintenance of market share through technical and commercial support, increased export earnings, continued availability of goods on the local market, promotion of foreign direct investment).
- *Shashi Private Hospital/Premier Services Medical Investments merger* (procurement efficiencies from consolidation of requirements and leveraging advantage, employment creation, continued availability of medical services in the relevant market).
- *Delta Beverages/Mr Juicy merger* (introduction of self-reliance in input requirements, employment creation, product price stabilisation).
- *Coca-Cola/Cadbury-Schweppes merger* (employment retention, increased export earnings, continued availability of goods on the local market, indigenisation or localisation of economic control, promotion of foreign direct investment, preservation of local beverage brands).
- *Zimtile/PG Merchandising merger* (employment retention, increased export earnings, continued availability of goods on the local market, better quality and wider range of products to consumers).

- *Innscor Appliances/WRS merger* (employment retention, increased export earnings, product price stabilisation, better quality and wider range of products to consumers).
- *Total Zimbabwe/Mobil Oil merger* (indigenisation or localisation of economic control).

The study on the socio-economic impact of implementation of competition policy and law in Zimbabwe also showed that the control and elimination by the Commission of restrictive business practices during the period under review (i.e., 1999 to 2005) had immense economic benefits to the country[284]. For example:

- **horizontal restraints arising from collusive and cartel-like behaviour were eliminated in key and essential industries and sectors, such as the cement industry, the coal industry and the dry cleaning and laundry services sector, that not only opened up the industries and sectors to new entrants but also improved the availability of goods and services;**

- **vertical restraints with substantial economic and efficiency benefits were however allowed to continue, but under control, in other essential industries like the coal tar fuel industry, thereby ensuring constant supplies of essential industrial inputs without wastage;**

- **abusive practices of firms in dominant positions in consumer products industries such as the alcoholic beverages industry and the cigarette industry, as well as in utilities sectors such as electricity and telecommunications that directly affect the consumer, were brought to an end; and**

- **entry barriers were removed in industries such as the cement industry, the coal industry, the sugar industry, and the fertilizer industry, resulting in the introduction of new economic players and increased employment.**

[284] *Report on Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe: Part II,* Competition and Tariff Commission, Harare, Zimbabwe, December 2008.

The Competition Commission has continued to play its developmental role. The Commission's determinations on more recent competition cases that have positively impacted on the country's economy include those outlined below:

Commission Determinations on Recent Competition Cases	
Restrictive Business Practices	***Mergers and Acquisitions***
• *Alcoholic Spirits Case:* Restrictive practices investigated were that the dominant supplier of rectified spirit (potable alcohol), a critical raw material in the production of alcoholic spirits, was abusing its monopoly position by engaging in exploitative and exclusionary practices that favoured traditional players in the alcoholic spirits manufacturing industry against new entrants. The remedial action taken by the Commission was that: - the dominant supplier was ordered to give its customers choice of collecting their spirit purchases using their own transport means instead of being forced to use the supplier's more expensive transport means; - recommendations were made to the dominant supplier to devise and implement a clear and transparent rectified spirit allocation system	• *Acquisition of Burley Marketing Zimbabwe by Farm-a-Rama:* The target firm was one of Zimbabwe's three tobacco auction floors, with a 31% share of the tobacco auctioning market (the other two auction floors being Tobacco Sales Floor, with 39% market share, and Zitac, with 30% market share). The acquiring party was an investment holding company with investments in a number of companies, including a 22% shareholding in Chemco Holdings Limited, a company which in turn held a substantial shareholding Tobacco Sales Floor, the leading tobacco auction floor. The Commission approved the merger on condition that the acquiring firm divests itself from Chemco Holdings Limited and sever any direct or indirect shareholding or directorship with Tobacco Sales Floor.

that takes into account its customers' requirements; and - recommendations were made to the relevant Government authorities to look at ways and means of encouraging increasing investment, both local and foreign, in the local production of rectified spirits. • *Waste Paper Collection Case*: The allegations investigated were against the dominant player in the water paper collection industry and involved: (i) the dominant player's exclusionary practices aimed at driving a new entrant out of the market; and (ii) the conclusion of exclusive supply agreements between the dominant player and some large waste paper converters. The following was the Commission's remedial action: - an order was issued against the dominant player to cease and desist its exclusionary practices against new entrants into the waste paper collection industry; and - parties of the exclusive supply agreements were ordered to terminate the agreements. • *Textile Fabrics Offcuts Case*: This case involved the existence of an exclusive	• *Acquisition of Tassburg Fasteners by Zimplow Limited:* This transaction was examined as a conglomerate merger with strong vertical and horizontal elements. The acquiring party was a manufacturer of animal drawn agricultural implements (ploughs, cultivators, harrows, planters, and hoes), while the target firm produced steel fasteners (wood screws, self-tappers, machine screws, bolts and rivets). The target firm had a supplier-customer relationship with a Division of the acquiring firm, called CT Bolts, to which it sold wood screws for distribution. CT Bolts also produced some fasteners in direct competition with the target firm. The merger was approved on condition that the merged party give the Commission an undertaking that it will continue to supply the target firm's products, particularly wood screws, to other distributors of steel fasteners in a fair and equitable manner. • *Acquisition of Schweppes Zimbabwe and Schweppes Exports by Delta Beverages:* This transaction was

textile fabric offcuts supply agreement between the sole manufacturer of textile fabrics in the Kadoma geographical market and one textile fabric off-cuts merchant, which was preventing new entrants into the market. The Commission's remedial action was as follows: - the textile fabric manufacturer was ordered to stop the practice of selling its fabric off-cuts exclusively to the off-cuts merchant, and not to enter into other exclusive supply agreements or arrangements with any other enterprise or organisation; and - the textile fabric manufacturer was also ordered to ensure that there is equal and unrestricted access to fabric off-cuts by all interested parties through its factory and retail shops. • *Packaging Ink Case:* This case involved allegations that Coates Brothers, a leading manufacturer and supplier of inks used in the printing of packaging material, had concluded an exclusive Ink Supply Agreement with Treger Plastics, a leading manufacturer of plastic packaging material, which was forcing other smaller ink	examined as a horizontal merger in the *carbonated and non-carbonated soft drinks market.* The competition analysis of the proposed merger shown that the transaction would lessen the degree of competition in the relevant market if the merging parties conclude a 'pure' merger. The level of import competition was however observed to be rising through increased imports of beverages into the country. Other public interest benefits of the transaction were identified as: (i) lower input procurement costs, translating into lower production costs, therefore lower product prices to the consumer; (ii) wider distribution of the beverage brands throughout Zimbabwe and in the region; and (iii) creation of a national champion able to withstand expected increased regional competition to be created by the liberalisation of trade under SADC and COMESA. To meet the identified competition concerns of the transaction, the merging parties restructured the transaction not to conclude a 'pure' merger but to maintain the merging parties as separate independent

manufacturers out of the market. While the Commission found that the Ink Supply Agreement between Coates Brothers and Treger Plastics was generally aimed at improving and ensuring the efficiency of ink supplies to the industrial users of the inks, it went further to extend its exclusive ink purchases and supply obligations to third parties intending to enter the printing industry. The Commission ordered Coates Brothers to remove the restrictive and anti-competitive provisions in its Ink Supply Agreement with Treger Plastics and to desist from incorporating similar provisions in future agreements with any other company or party.	companies in the beverages industry, with the management and employees of the target firms acquiring controlling interest in the firms through a company specifically established for that purpose. The Commission therefore approved the merger on the following conditions: - that the acquiring party guarantees the continuity of the local *Schweppes* beverage brands (i.e., the *Mazoe* and *Calypso* brands); - that the target firm maintains its existing raw material supply agreements with local suppliers; and - that both the merging parties enter into competition compliance agreements and programmes with the Commission.

The implementation of competition policy and law in Zimbabwe has therefore been developmental if guarded by the common economic development measurement tools of job creation, economic growth, and increased or retained tax bases. Competition policy has provided incentives for innovation and for investments to develop efficient production and distribution systems for goods and services, which is line with the generally accepted process towards economic development.

Conclusion

It has been hypothesized in this paper that the role that competition policy plays in promoting economic development is that competition policy is a process that leads to, or at least contributes towards, economic development. To a very large extent, the implementation of competition policy and law in Zimbabwe has proved that hypothesis.